

11/15/18
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Lord CAMDEN's
A R G U M E N T

IN *Ex gratia*
Doe on the Demise of *Hindson*, &
Ux. & al. v. Kersey.

WHEREIN

Lord MANSFIELD's *Murray (v.)*
A R G U M E N T *Sty*

IN

Wyndham. v. Chetwynd,

IS

Considered and answered.

"Magna se Judice quisque tuetur."

L O N D O N:

Sold by J. WILKIE, in St. Paul's Church Yard.

MDCCLXVI.

(Price Four Shillings.)
X



To the READER.

AS the following Sheets contain the Arguments of two of the Chiefs of the Law, you may perhaps expect a Sketch of their Characters, by Way of Preface.

Many Reasons dissuaded me from such an Attempt; for I must, in the first Place, have infringed the principal Rule of Biography, by giving the *Lives* of the *Living*, that Science admitting *only those* of the *Dead*; besides, the Arguments themselves will in some Measure answer your Expectations, for they will exhibit the two Chiefs in their *judicial* Capacity, the only Light they are to appear in on this Occasion; for these Reasons (among others) I declined becoming their Biographer.

It may be proper to offer a Word or two concerning this Publication.

I presume you will require no Apology for it, as these Arguments are confessedly the best that have been delivered in *Westminster-Hall* for upwards of half a Century last past. Their Subject is of universal Concernment; for who is there that does not, at one Time or other of his Life, want Advice concerning the Disposition of his Estate, in order to avoid leaving his Family and Friends Vexation, Expence, and Trouble, instead of Contentment, Affluence, and Independance?

Lord *Mansfield's* Argument is transcribed from Master *Burrows's* judicious Reports, and you may depend on the Authenticity of Lord *Camden's*.

I shall now endeavour to justify my publishing Lord *Camden's* Argument without Permission; as Master *Burrows* has ventured before me to publish Lord *Mansfield's* Argument on the very same Subject without *Authority*, I beg Leave to make

Use of his Words on this Occasion. You may perhaps take an Objection to the Competency of my Evidence, because as the Master's Preface is an Answer to "His venturing to print, without the Sanction of a Licence, to authenticate his Reports," that he is an interested, and consequently an incompetent Witness; but hear the Testimony, *See 1. Burr. in pref. acc. pages 6. 7. &c. But for James Burrows's words are not literally in the same order. The evidence here only avails himself of parts of James's language.*

To the READER.

v

and after you have weighed and applied it, give Judgment.

✱ This Difficulty alarms me *most*.

I know it is a Contempt of the Courts of Justice to publish their Proceedings. They ought to be published under *authoritative* Care and Inspection: But since the Year-books, no judicial Proceedings have been so published by any Court in *Westminster-Hall*, except the State-Trials.

Licences by the Chancellor and Judges proceeded upon the Character of the Reporter *only*; without saying a Word of the *Work* itself, or that the Licensers ever *saw* it. Such Licences (to allow and approve of the printing and publishing) took their *Rise* from the Necessity of a Licence to print, as the Law *formerly* stood; and have *continued* in the *same* Form of Words (without any Meaning,) *since* the *Reason* of them has *ceased*.

I have been assured that some now possessed of judicial Offices have declared, "They *never would* sign one; because it hangs out false Colours, and misleads those who think it gives the least Approbation or Authority to the *Work*."

Such

Such a Licence, could it have been obtained, would still have left my *Report* to stand upon it's own Merit.

I had not the *Impudence* to attempt getting an Approbation of Lord *Camden's Argument*; wherefore I have ventured to follow the Example of Mr. Justice *Foster*, and to publish my Notes of it without any Leave or Licence.

There are many Instances where Men, who have published Matter relative to a Cause depending, or soon after it was over, have been punished as guilty of a Contempt; most justly and wisely, for many Reasons: But a Publication of Reports at a *Distance of Time*, merely as Matter of *Science*, has not been animadverted upon; though within the Letter of the Law. Where they have been published surreptitiously, without Consent of the Reporter, the Printers have been proceeded against civilly upon the Foundation of his Property; but not criminally: And after the surreptitious Edition has been stopped by an Injunction, the Book has been published, with Consent of the Reporter, without Leave or Licence; and no Notice taken, or Complaint made of it.

I trust

To the READER. vii

I trust my Excuse (as Mr. Justice *Foster* did) to my Intention.

I do most humbly beg Pardon of my Lord *Camden* for innumerable Injuries I must have done his Lordship as to *Language* and Argument. I did not take my Notes in Short-hand, I watched the *Sense*, rather than the *Words*; and therefore may often use some of my own.

Not being blessed with the quickest natural Parts, I may have misapprehended Topics and Allusions; I may have made Blunders in the Sense, by endeavouring to rectify those of my Pen. These are Imperfections which Diligence could not cure. I am only concerned, lest my Errors should be imputed, not to myself, but to that able and upright Judge whose Discourse I may happen (through my own Infirmities) to misrepresent.

To conclude.

Cum tua non edas carpis mea Carmina Læli:

Carpere vel noli nostra, vel ede tua.

Martial, lib. I. Epigr. 92, Edit. Lugd.

Bat. 1661.

Inner-Temple,
Trinity Term, 6 Geo. 3.

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AS Lord *Camden* entered so very minutely into Lord *Mansfield*'s Argument, upon delivering his Opinion, it was thought necessary to prefix it.

Lord Chief Justice MANSFIELD'S

A R G U M E N T, &c.

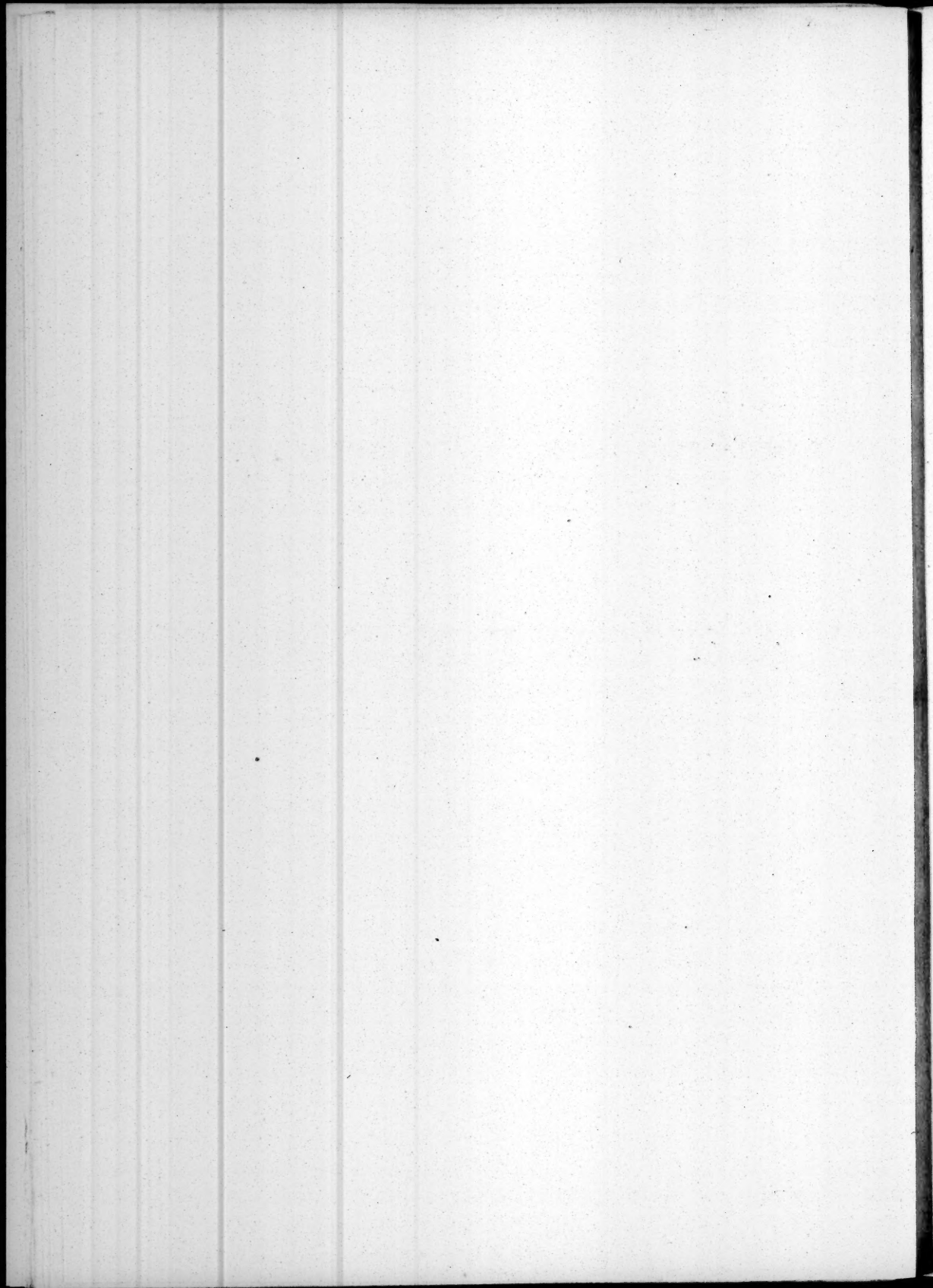
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Lord Chief Justice MANSFIELD'S

A R G U M E N T, &c.



Lord Chief Justice *Mansfield's*
A R G U M E N T

I N

Wyndham, Esq; v. Chetwynd, Esq;

Delivered in

Michaelmas Term, 31 Geo. 2, 1757, K. B.

A special Verdict upon a Will of Land, dated the 14th of May, 1750, and a Codicil of the same Date, made by Walter Chetwynd, late of Grendon, Esquire.

The special Verdict.

AT which Day, before our Lord the King at *Westminster*, come as well the said *William Wyndham*, *Malachi Lindon*, *Catherine Lindon*, *Thomas Stephens* alias *Walter Paris* alias *Walter Chetwynd*, *Susanab Blacknell*, *Henry Perrott*, *George Hudleston*, and *James Crofts*,

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by

by their Attorney, as the said *William-Henry Chetwynd* by his Attorney. And the Jurors, &c. being summoned, &c. do come, &c. and being elected, &c. do find as to the first Issue joined between the said Parties, that the said *Walter Chetwynd* was at the time of making the said Writings importing to be his last Will and Codicil, of sound Mind. As to the third Issue, they find that the Testator did not, by the said Writing importing to be his last Will, devise to the aforesaid *William Wyndham* and his Heirs any Lands or Tenements in the County of *Warwick*, in Trust or for the Benefit of the said *Thomas Stevens* alias *Walter Paris* alias *Walter Chetwynd*. And as to the fourth Issue, the Jury find that the Testator did not, by the said Writing importing to be his last Will, devise to the said *Catherine*, now *Catherine Lindon* the Wife of the said *Malacki Lindon*, an Annuity of 200*l.* by the Year, for the Term of her natural Life. And as to the second Issue, the Jury find that the Testator was in his Life-time seised in Fee of certain Lands, Tenements, &c. in the several Counties of *Warwick* and *Stafford*, of the yearly Value of 3100*l.* and being so thereof seised, he the said *Walter Chetwynd*, in his Life-time, signed, sealed, and published a certain paper Writing bearing Date the 14th Day of *May*, 1750, purporting to be his last Will and Testament, and likewise another paper Writing purporting to be a Codicil indorsed on the said first mentioned paper Writing, and of the same Date; (which Will and Codicil it sets out in *hæc verba*;) and in the former, there is a Charge upon the Residue of his real and personal Estates, for the Payment of all his just Debts, Legacies, and Incumbrances: And that the said paper Writings were so signed, &c. by the said *Walter Chetwynd* in the Presence of *Stafford Squire*, *Robert Baxter*, and *Jesiah Higden*; who likewise attested the same at his Request, in his Presence, and in the Presence of each other. And they further find, that the said *Stafford Squire* and *Robert Baxter*, being Attorneys at Law, were in or about the Year 1747 employed by the said *Walter Chetwynd*

to

to solicit a private Act of Parliament “ for Sale of the Estates late of *Henry Fleetwood*, Esq; deceased, in the County of *Lancaster*, for raising Money to discharge Incumbrances affecting the same, &c.” And that the said *Stafford Squire* and *Robert Baxter* charged the said *Walter Chetwynd Debtor in their Books*, for the Fees and Expences of passing the said Act, and which Charge continued so until and after the Death of the said *Walter Chetwynd*. And that at the said Time of the said signing, sealing, and publishing of the said several paper Writings, and also at the Time of the Death of the said *Walter Chetwynd*, there was due and owing to the said *Stafford Squire* and *Robert Baxter*, for the said Business done, the Sum of 318*l.* and that some Time after the Death of the said *Walter Chetwynd*, the said *Stafford Squire* and *Robert Baxter* delivered a Bill for passing the said Act to the Trustees nominated and appointed in and by the said Act of Parliament for the Purposes therein mentioned: And afterwards, and before the Examination of the said *Stafford Squire* and *Robert Baxter* in this Cause, the said *Stafford Squire* and *Robert Baxter* received from the said Trustees, at several different Times, several Sums, amounting in the whole to 302*l.* 4*s.* 8*d.* $\frac{1}{4}$, and that the said Trustees were willing to have paid the Remainder, if it had not been for a Miscalculation. And the Jury further find that in the said private Act of Parliament there is contained a certain Clause for Payment of the Expences attending the said Bill, (which Clause they find *in hac verba.*) They further find that at the Time of the signing, sealing, publishing, and attesting the said paper Writings, there was a current Account open and subsisting between the said *Stafford Squire* and *Robert Baxter* and the said *Walter Chetwynd* for other Business, exclusive of the Expences of passing the said private Act; on the Balance of which Account, if stated at that Time, the said *Stafford Squire* and *Robert Baxter* were indebted to the said *Walter Chetwynd* in the Sum of 138*l.* 14*s.* 10*d.* They further find that at the said Time of the attesting
of

of the said Writings, and also at the Time of the Death of the said *Walter Cbetwynd*, there was due and owing from him to the said *Josiah Higden*, his Apothecary, the Sum of 18*l.* 5*s.* 5*d.* on simple Contract; Eleven Pounds whereof were so due on 25th *December*, 1749, and before the last Sickness of the said *Walter Cbetwynd*. They also find that the said *Walter Cbetwynd* died on the 17th of *May*, 1750, without Issue, and seized, &c. and that the said *William-Henry Cbetwynd* is the only Brother and Heir at Law of the said *Walter Cbetwynd*. They further find that his real Estate at the Time of signing, &c. and also at the Time of his Death, was subject to certain Mortgages made thereof, by the said *Walter Cbetwynd*, to the amount of 19000*l.* and of 5000*l.* more, made by the said *Walter Cbetwynd*'s late Father. And that the said *Walter Cbetwynd* owed at the Time of his Death, by Bonds, the Sum of 1600*l.* and by simple Contract 2874*l.* and that his personal Estate then amounted to 13972*l.* and was sufficient to pay all the simple Contract Debts and Bond Debts of the said *Walter Cbetwynd*. And that the several real Estates so in Mortgage were of Value more than sufficient to satisfy the several Incumbrances affecting the same. The Jury further find that on the 2d of *August*, 1750, the said *William-Henry Cbetwynd* filed his Bill in *Chancery* against the said *William Wyndham*, &c. for the obtaining a Decree and Recovery of the said Lands, &c. and thereby contested the Validity and due Execution of the said paper Writings. That Answers were put in, and Amendments made to the Bill; and other Answers put in: And the said *William-Henry Cbetwynd* prosecuted the said Suit in *Chancery* with all due Diligence. The Jury further find that the said *William Wyndham*, as Executor of the said *Walter Cbetwynd*, paid to the said *Josiah Higden* the said Sum of 18*l.* 5*s.* 5*d.* after the Death of the said *Walter Cbetwynd* and before the Examination of the said *Josiah Higden* in this Cause. And that the said *Josiah Higden* had not, at the Time of his Examination in this Cause, any demand upon the said

Walter

Serjeant Prime and Mr. Norton's Argument. 7

Walter Chetwynd. But whether upon the whole Matters aforesaid by the Jurors in form aforesaid found, the said paper Writings or either of them were or was DULY EXECUTED by the said *Walter Chetwynd*, so as to pass Lands or Tenements, or not, the said Jurors are wholly ignorant; and therefore pray the Advice, &c. &c. *Bur. Rep.* 414, &c. *Burn's eccl. Law*, 531, 532.

It was argued by *Serjeant Prime* for the Plaintiff; first, that the Facts, as stated, did not make them interested Witnesses; secondly, That supposing them to have been interested, yet the Interest was removed before the Time of Trial. As to the first, They are no Legatees, and derive nothing from the Gift or Bounty of the Testator; they were justly intitled to Payment of their Debts, though no Will had ever been made; the personal Assets were the proper Fund for them to resort to, and that is sufficient to pay their Demands; so that they are not interested in the Charge on the real Estate. As to the second Point: They were competent Witnesses at the Time of Examination, their Debts being then discharged. The Word "*credible*" in the Statute 29 *Car. 2. c. 3.* is an ambiguous Expression, and capable of many Senses; but there seems to be a parliamentary Exposition thereof in the Statute of 4 & 5 *Ann. c. 16. §. 14.* whereby three Witnesses are required to authenticate a nuncupative Will, and it is declared, that such as are good Witnesses in Trials at Common Law, shall be deemed good Witnesses to establish a nuncupative Will. Now allowing the same Exposition to take Place in the Statute of Frauds; then as these Witnesses would be unexceptionable on a Trial at Law in respect of Interest, so they are competent (and therefore credible) Witnesses to the present Devise. And there were cited diverse Cases to this Purpose.

On the other Side, *Mr. Norton* argued for the Defendant; that at the Time of the *Attestation* the Witnesses were interested, and therefore incompetent; and that this, and not this
Time

Time of Examination, is the proper Time of inspecting their Credibility; else it would open greater Opportunities of Fraud and Perjury, than before the Act; it would be setting up Witnesses to hire; and would put the Validity of the Will in the Power of the Witnesses, by releasing or not releasing their Interest. If a Witness is unexceptionable at the Time of Attestation, and afterwards becomes infamous or insane, the Will is nevertheless a good Will: Which proves that his Condition at the Time of Attestation is alone to be regarded. And to this Purpose were cited also divers Cases; and it was observed, that most of the Cases cited on the other Side were prior to the Statute of Frauds. He insisted, that the Word "*credible*" means something more than *competent*: The Law required Competency before; and it is not to be imagined, that the learned Compiler of this Statute (Lord Hale) would put in a Word, which at best was superfluous: That in the Statute of 13 C. 2. against Deer-stealing, and in all the Game Laws, the Expression of *credible* Witnesses is used, which hath always been understood to mean more than *competent*, and to give the Justices a Discretion whether they will convict upon such Testimony or not, though the Witness was in Law strictly admissible. And he insisted on two Cases, as directly in Point, *viz.* *Hilliard* (1) & *Jennings*, and *Anstey* (2) & *Dowling*. 2 Burn's eccles. Law, 532.

After the Court had taken some Time to consider of it, they all agreed that the Will was *duly* attested by three *credible* Witnesses. And now

Lord Mansfield delivered the Opinion of the Court, to the following Effect.

The Doubt made by this special Verdict sprung, after the Cause of *Anstey*, v. *Dowling*, out of the general Question then
much

(1) Lord Raym. 505. Com. Rep. 90. pl. 60. id. 94. pl. 64. Carth. 514. 12 Mod. 277. Freem. 509. pl. 685.

(2) 2 Stra. 1253. Har. Just. 49, 50.

much agitated, "Whether a Benefit given to a subscribing Witness by the Will, either under a general or particular Description, should annul his Attestation, as *at the Time of his* subscribing; and make the Will wholly and absolutely void, for want of Form, as much as if he had never attested at all; *though at or after the Testator's Death, he might be disinterested, and competent to be examined in Support of the Will?*"

This *general* Point is the Basis of the Objection to these subscribing Witnesses. Unless the Defendant can support it he has no Ground to stand upon: But though he should succeed in the *general* Proposition, the Application to *this* Case may fail, from the *particular Circumstances*, and the *Kind* of Benefit objected.

The Question does *not* depend upon the Construction of any Words of the Statute. The Statute is silent as to the *Capacity* of the Witnesses: It declares no Incapacity: It requires no Qualification.

The Epithet "credible" has a clear precise Meaning. It is not a Term of Art appropriated only to legal Notions; but has a Signification universally received. It is never used as synonymous to *competent*. When applied to Testimony, it presupposes the Evidence given.

After the Competence of a Witness is allowed, the Consideration of his Credibility arises, and *not before*. Persons undoubtedly credible *cannot* be Witnesses *under particular Circumstances*: Persons manifestly incredible *may be*, and *often are* Witnesses.

In Acts of Parliament which direct Convictions upon the Oaths of Witnesses, the Epithet "*credible*" is added; but by no Means intended to signify "*competent*," *that* is implied in the Term "Witness." But it is intended, (from abundant Caution,) to declare, that though competent Witnesses swear positively, their *Credibility is to be weighed*: And if the Magistrate thinks the Evidence *not credible*, he ought not to convict.

In this Sense, it was very unnecessary to add the Epithet, here, to subscribing Witnesses. And yet, to make the essential Solemnity of the Will depend upon the *Credibility* of the subscribing Witnesses, is so absurd, that their Credibility has always been held to make *no Part* of the necessary Form.

If they all swear that the Testator did not execute; if they had, at the Time, the worst Characters, and had committed the most infamous Actions; yet their Attestation answers the necessary Form: Because the Testator meant to comply with the Law, and might not know them to be bad Men.

The third Rule or Caution in making Wills, given at the End of *Butler and Baker's Case*, 3 Co. Rep. 36 b. is — “ At the Time of the Publication of the Will, call *credible* Witnesses to subscribe their Names to it,” Lord *Coke* certainly meant “ Persons of Credit and Character.”

From hence, and from the Usage in penal Acts directing Convictions, I am persuaded that the Epithet was inserted here, as a Word of Course, and misapplied. Had the Operation or Effect of the Word, in this particular Case, been attended to, it never could have been inserted; because in the *natural* and *obvious* Sense, the Meaning must be rejected, from the Consequences it would have: And in *any other*, it has no Meaning at all; for, suppose it to signify *competent*, Competence is *implied* in the Word “ Witnesses.”

This whole *Clause*, which introduces a positive Solemnity, to be observed, not by the learned only, but by the unlearned; at a Time when they are supposed to be without legal Advice; in a Matter which greatly interests every Proprietor of Land; where the Direction should be plain to the *meanest* Capacity; is so loose, that there is not a single Branch of the Solemnity defined or described with sufficient Certainty to convey the same Idea to the *greatest* Capacities.

There have been (1) Litigations, and contradictory Opinions,

(1) There is a common Notion in *Westminster-Hall*, that the Statute of Frauds hath not been explained at a less Expence than 100,000*l*. *Observations on the Statutes*, 129.

nions, upon *almost every Part* of the Form, as "What is *Signing* by the Testator? Whether the Witnesses are to attest *uno Contextu, uno eodemque tempore*? Whether they are to *see* the Testator sign? Whether they ought to know that he signs it *as his Will*? Whether he ought to publish it *as his Will*?" A very little Precision, and a very few Words, might have prevented all these Questions.

In a Clause not the most accurate, I can easily believe that the usual Epithet "*credible*" slipped in as of Course, without Attention to the *Impropriety* of using it on this Occasion.

It has been said "that this Act of 29 Car. 2. c. 3. was drawn by Lord Chief Justice (2) *Hale*;" but this is scarce probable, since it was not passed till after his Death: And it was brought in, in the common Way; and not upon any Reference to the Judges.

But what Sense soever is put upon this Word "*credible*," the Statute leaves the Question just as it was: For it does not declare who *are*, or are *not* credible; or, (if it is supposed to mean *competent*,) who are competent, or who are *incompetent*.

Their Competence could not be referred to any Law then established: Because there was, there could be none applicable throughout to this new Case. The Necessity of subscribing Witnesses to any Instrument, never had existed before in *this Country*. There never could have arisen, in the Law of *England*, a Question. "concerning the Competence of a Witness, at the Time of his knowing the *Fact* he came to testify;" but only "whether he was competent at the Time of his *Examination*."

The Time of *Examination* could *not* possibly be the Criterion upon which the Validity of the Will was to depend. The Witnesses might *not* live to be examined: Their Incom-

C 2

petence

(2) It is great Injustice to the Memory of L. C. J. *Hale* to say he was the Person who drew it. *Observations on the Statutes*, 129.

petence to be examined, might arise *long after* their Attestation.

“What Objection therefore to the subscribing Witnesses should be sufficient to avoid a Will, as *informal*” was left to be judged of as Cases should arise; by general Principles, by analogy to the Law of Witnesses in other Instances, and by Arguments drawn from the Nature and Fitness of the Thing, with regard to Justice, Convenience, and the Intent of the Statute.

When Solemn Determinations, acquiesced under, had settled precise Cases, and become a Rule of Property; they ought, for the Sake of Certainty, to be observed, as if they had originally made a Part of the Text of the Statute.

I will therefore consider the *general Question*, in two Views:

1st. Supposing there had been *no judicial Determinations* relative to the Capacity of subscribing Witnesses since the Statute:

2dly. Upon the *Foot of the judicial Determinations* that have been since the Statute. And,

3dly. In the last Place, I will consider the *particular Case* now in Judgment, under all its own Circumstances.

First — Considering the Matter *at large*; let me observe, that the Power of devising ought to be favoured.

It is a natural Consequence of Property, and the Right a Man has over his *own*. It was a Right by the Law of the Land before the Conquest, and down to about the Time of Henry the Second. It ceased, consequentially only, by the Introduction of Feodal Tenures; because, *originally*, every Species of Alienation was contrary to that System.

As soon as the Power of Alienation *inter vivos* was indulged, Testaments followed, indirectly, as Declarations of Uses.

The Statute of *Uses* accidentally *checked* this Form of devising. Therefore the Statute of *Wills* was made.

The

The 29 *Car.* 2, c. 3. (which gives rise to the present Question) did not mean to *restrain* testamentary Dispositions of Land: The Reasons to encourage that Power were *increased*.

The Policy of Tenures, from whence arose the Impediment to Wills, was abolished; but had left many Consequences remaining, which made testamentary Dispositions of *Land*, more reasonable than they were among the *Greeks* and *Romans*, or here before the Conquest.

The eldest Son only is Heir, *ab intestato*. Among Collaterals, not all the next of Kin, but one often is Heir; to the Exclusion of many in the same, and many in a nearer Degree. Simple contract Creditors had no Right to be paid their Debts. Money invested in Land could not be traced. Much Land was in Trust: Where the Widow had no Right to Dower.

In *Personal* Estates the Succession *ab intestato* is subject to all Debts, and governed by natural Family Equity.

In *real* Estates, the Succession is governed by political Consequences of a positive System: Which make the testamentary Power often necessary, to enable a Man to do Justice to his Family, and his Creditors.

The Legislature meant only to guard against Fraud, by a solemn Attestation; which they thought would soon be universally known, and might very easily be complied with. In Theory, this Attestation might seem a strong Guard; it may be some Guard in Practice; but I am persuaded many more fair Wills have been overturned for Want of the Form, than fraudulent have been prevented by introducing it.

I have had a good deal of Experience at the Delegates; and hardly recollect a Case of a forged or fraudulent Will, where it has not been solemnly attested. I have heard eminent Civilians who are dead, and some now living make the same Observation.

Suppose the subscribing Witnesses honest; how little need they know? They do not know the Contents; they need
not

not be together; they need not see the Testator sign; (if he acknowledges his Hand it is sufficient;) they need not know it to be a Will; (if he delivers it as a Deed, it is sufficient.)

For these and many more Reasons, it is clear that Judges should lean *against* Objections to the Formality. They have always done so, in every Construction upon the *Words* of the Statute; *à fortiori* ought they to do so, in raising a consequential System, *not* prescribed in Words. And still more ought they to do so, if that System would spread a Snare, in which many honest Wills must unavoidably be intangled; and be no Preservative against Fraud.

At the Time this Act was made, the Law rejected no Witness to prove a Will; unless, at the *Time of his Examination*, his Testimony tended to support his own Title, and enable himself to hold or recover an Interest under it.

In the ecclesiastical Court, the Probate is conclusive to every Body as to every Part. If a Legatee come to prove it, he intitled himself to his Legacy. But if the Legacy was contingent, and at the Testator's Death could not take Effect; if he had the same or a greater Interest, though the Will should be set aside; he was a Witness: A Release, Payment, or Tender, made him a Witness.

In the Courts of Common Law, where the Witness had a Charge upon Land devised to another, he was just in the Case of a personal Legatee. If he had as great an Interest the other Way; if his Interest at the Testator's Death could never take Effect; if there was a Release, (of which several Authorities were cited;) and I will add, as by necessary Consequence, if there was Payment or Tender; he was a Witness.

Nice Objections, of a remote Interest, which could not be paid or released, though they held in other Cases, were not allowed to disqualify a Witness in the Case of a Will: As parishioners might prove a Devise to the Use of the Poor of the Parish for ever, 2 Sid. 109.

Before

*See 1. Roll. 651.
1. Sid. 315. 1. n.
This case before
Judge Rogers 1720
in 11. G. 2. 1. n. p.
S. B. Hall. 1721.
15. 2. G. 2. 50.*

Before the Statute, no Man could, in a Court of Justice, intitle himself by his own Examination, to a Devise. So, after the Statute, no Man should intitle himself, in a Court of Justice, to a Devise, by Virtue of his own Subscription, which at the Time of subscribing, he could not have proved by his Examination.

The Disability of a Witness from *Interest*, is very different from a *positive* Incapacity. If a Deed must be acknowledged before a Judge or Notary Public, every other Person is under a *positive* Incapacity to authenticate it: But Objections of *Interest*, are Deductions from natural Reason, and proceed upon a Presumption of too great a Bias in the Mind of the Witness, and the public Utility of rejecting partial Testimony.

Presumptions stand no longer than till the Contrary is proved.

The Presumption of Bias may be taken off, by shewing the Witness has as great, or greater Interest the other Way; or that he has given it up.

The Presumption of public Utility, may be answered, by shewing that it would be very inconvenient, under the particular Circumstances, not to receive such Testimony.

Therefore from Necessity, the Course of Business, and other Reasons of Expedience, numberless *Exceptions* are allowed to the *general* Rule.

The Presumption of Bias arises as at the Time of *subscribing*. But it may be answered. If Part is devised to a subscribing Witness, the Presumption is answered, by shewing he was Heir at Law; or that the Devise is void; or that he has renounced it.

Where is the Reason to say, that a Witness who does not know the Contents of a Will during the Testator's Life, and at his Death takes no Benefit, was biased at the Time he subscribed, or can be biased at the Time of his Examination?

During the Life of a Testator, Devises are mere Possibilities: No Interest can vest till his Death. The Presumption of Bias from

from the *Possibility*, is answered by the Fact when it *becomes* an Interest. His swearing when he is totally *disinherited*, is conclusive, that the Possibility is *not* to be presumed the corrupt Cause of his subscribing.

For the sake of third Persons, it is wise and just, to allow the Objections thus to be purged: Otherwise, many Settlements by Will must be over-turned, to the Ruin of Families.

It is natural and usual to give Legacies to Servants, and Tokens to Friends. Persons under these Descriptions are most likely to be Witnesses. Ought such Trifles to over-turn *unavoidably* the most deliberate Dispositions of the greatest Estates? which may be attended often with this Family Distress, that a Man may have given his Money to one Part of his Family, and his Land to another: In which Case, the Will would be good as to the Money; and void as to the Land.

If the Legislature had *said so*, that would have been a *positive* Rule: But it is contended for, by *Construction*, and to guard against Fraud.

It is not a Guard, even in Theory, in the Case of *Legatees*: Because, they may, in another Shape, attest the Devise which charges the Land with their Legacies.

It is settled, "That where the Land is once charged, (and it always is an auxiliary Fund,) with the Payment of Legacies, by a solemn Devise, the Legacies may be given, altered, or revoked by a subsequent Will *unattested*." The fraudulent Legatee might attest the Charge, and get his Legacy in a Codicil *unattested*.

Let a Will be ever so fair, a Slip in Form is fatal: Which is a certain Mischief. But, if a Will be fraudulent; though it is allowed to be formal, it may be set aside upon Evidence and Circumstances.

Neither Reason, nor Policy requires the Objection to be carried farther than I have laid it down; agreeable to the Law before the Statute, and the universal Maxim, "*Testis in propria Causâ non est adhibendus*."

But

But *if* Judicial Determinations, acquiesced under, and become a Rule of Property, since the Statute, have *extended the Incapacity* further, they must be adhered to. Which brings me,

Secondly, To consider the *Judicial Determinations* since the Statute.

All the Determinations agree exactly with these Principles.

In many Instances, the Presumption of *Bias from a Legacy*, at the Time of subscribing, has been allowed to be *taken off* by a Release. Authorities in Print have been cited, to shew "this was considered as a settled Point:" And I verily believe it was so, from the Authority of the oldest and most eminent Practicers in *Westminster-Hall*; and therefore I give Credit to the *Dictum* of *Powys* in 12 *Vin. abr.* 14. pl. 53. "That it had been solemnly agreed by the Judges, that where a Person had a Legacy given, and did *release it*, he was a good Witness to prove the Will."

I know that before the Case of *Anstey v. Dowling*, a Will of a very great Estate was liable to the Objection; and the Heir at Law would have contested it: But as it was certain the Witnesses would be paid, or release, no Opinion that he took encouraged him to think it worth his While.

Mr. *Fazakerley* and Sir *Thomas Bootle* have told me, they took it to be settled: And indeed the Number of Wills where the Objection lay and never was taken, demonstrated it.

There is not a single Determination which carries the Incapacity farther than the Rule I have laid down; *viz.* "That a Person shall not in a Court of Justice, intitle himself to a Devise, by Virtue of his own Subscription, which at the Time of subscribing he could not have proved by his Examination."

That is the Case of *Hilliard v. Jennings*. That is the Resolution and Judgment of the Court in the Case of *Anstey v. Dowling*. There the Defendant was Devisee; subject to an Annuity of 20*l.* a Year to *Elizabeth* the Wife of *John Hailes*, for her Life, for her separate Use: And there did not appear

to be any personal Estate. Her Interest was a Charge, in the Nature of a Legacy, to be paid by the Defendant, out of the Estate devised to him: And being for her separate Use, it was a Trust; and the Defendant was her Trustee. Upon the Validity of the Devise to the Defendant, her Annuity depended. If he succeeded, *her* Title followed of Course; for he must take the Land, as the Testator gave it, subject to the Charge and Trust: And upon the Devise to the Defendant being found good at Law, a Court of Equity must, of Course, have decreed the Trust. So that *she* was the *Cestuy que Trust* of the Party to the Cause; and either Way, the Judgment would immediately affect *her* Interest.

In Matter of Evidence, *Husband and Wife* are considered as *one*; and *cannot be Witnesses*, the *one* for the *other*. The Husband cannot be Witness *for his Wife*, in a Question touching her *separate* Estate.

There was *no Release*. There could be *no Payment*, or *Tender*, without the Interposition of a Court of Justice; because the Value depended upon incertain Estimation: But no Attempt had been there made towards paying, or tendering the Value of the Annuity.

This brought it precisely to the Case of *Hilliard v. Jennings*: The Witness, in a Court of Justice, was to support a Devise to himself, by Virtue of his *own* Subscription; (for the Case is the same, as if the *Wife* had been the *Witness*, or the *Husband* the *Devisee* of the Annuity.)

It is true that Lord Chief Justice *Lee*, in delivering his Opinion [in *Easter Term*, 19 G. 2. 1746~~8~~] argued as if the Objection of Benefit from the Will to the Witness, at the Time of subscribing, could not be answered or taken off by any subsequent Fact: Which he grounded upon the Authority of the Roman Law from the Digest, and Code; where it is said "Conditionem Testamenti tunc inspicere debemus, cum Signarent, non mortis tempore." But the Sense of this Passage was not enough considered.

4/2 the case of Atterley v. Jones King L. Bra. 1253. See also what he said about the devise. Lord Mansfield's account in 1 Ves. 593. in the case of Price v. Lloyd. See also p. 22.

"Con-

"*Conditio Testium*" here means the *positive Capacity* of the Witnesses; their Rank, or Quality, as Freemen, Citizens, Adult.

There *never* was a Time, in the *Roman Law*, when *Interest under the Will* was any Objection to subscribing Witnesses.

To explain this a little farther —

The Essence of the *Roman Testament* was the Appointment of an Heir, to represent the Testator.

Before the 12 Tables, the Testamentary Heir might be made *two Ways*; in (1) *Prociñctâ*, as *Plutarch* describes at the Siege of *Corioli*; or in the Form of a legislative Act, in *Comitiis calatis*.

The 12 Tables gave an absolute Power to every Man, to make the Law of his own Succession; but prescribed *no Form*.

As a Testament was an Alienation of the Testator's Property and Family after his Death, the Form of Mancipation *per Æs et Libram*, used in other Transfers of Property or Family, was followed in *this*: The Heir was supposed to *buy*, and the Testator to *sell* his Succession and Family, for and as representing their Families. The Ceremony was transacted with all the Symbols of a Sale; in the Presence of the Officer who held the Balance, and of *five* Freemen, Citizens of *Rome*, 14 Years of Age at least, solemnly required to bear Witness.

These Ceremonies and Symbols were invented *before* Instruments in *Writing*: And this imaginary Sale, *per Æs et Libram*, was used in Alienations, Adoptions, and almost every Species of Change of Dominion, or Property strictly so called, ("*Proprium est quod Quis Librâ mercatur et Ære*,") and in many other Contracts.

Subsequent Laws and Usages, especially *after* Testaments came to be in *Writing*, took away the Ceremony of the *Symbolical Sale*, added *two* Witnesses more, and prescribed *Forms of Attestation*; but left the *Condition of the Witnesses* the same:

D 2

They

(1) *Prociñctâ*. 2 *Burn's eccles. Law*, 535.

They must be Freemen, *Roman Citizens*, Adult, and *Testabiles*. Yet by an equitable Construction, *general Reputation* was sufficient: As where the Witness, whom *every Body considered* as a Freeman, really was a Slave.

This was the *Conditio Testium*, and must *exist at the Time of subscribing*: As much as where there is a Custom to surrender into the Hands of two Copy-holders out of Court, they must be Copy-holders *at the Time*.

Though in *other Cases*, the Objection of *Interest*, to a Witness, was allowed; it did not incapacitate Witnesses to a *Will*.

While the Testament *per* (1) *Æs et Libram* continued, neither the Testator, or Heir, or any of the Families of either, could be Witnesses; because they were supposed the *Parties* to the Contract.

When the symbolical Sale ceased, and Testaments were *in Writing* and *secret*, the *Heir himself* was a sufficient subscribing Witness. Afterwards, though the Will was *open*, and he *knew* the Contents, he was a sufficient subscribing Witness: As appears from *Cicero* for *Milo*, speaking of *Cyrus*, "*Una fui; Testamentum simul obsignavi cum Clodio; Testamentum autem palam fecerat, & illum Heredem & Me Scripserat.*" 6 Vol. 4to. Oliv. Edit. p. 253. Sect. 18. (2)

Justinian Inst. Lib. II. Tit. 10. § 10. recites the *Heir having been allowed* to be a Witness; but forbids it (not upon the Foot of his being interested, but) "*ad Imitationem pristini Familiæ Emptoris; quia hoc totum Negotium, Testamenti ordinandi gratiâ, creditur hodie inter Testatorem & Heredem agi.*" But in the next Section (§ 11.) he expressly allows the *Cestuy que Trust*, and Legatees, to be subscribing Witnesses; "*Quia non Juris successores sunt.*" And yet the Heir *might be* merely a Trustee for the whole Inheritance to be delivered to the *Cestuy*

(1) *Of. 2 Barn's ecclef. Law. 534.*

(2) The learned Reporter's Reference is Sect. 48. I was not able to find the Passage alluded to by it; have therefore presumed to be somewhat more explicit.

Cestuy que Trust; and the Legatee might exhaust the whole Estate.

This abundantly shews that the Passage from the Code and Digest did *not* relate to Witnesses being *Interested*.

And the Code and Digest are consistent with the Institute, on this Head.

The Code, Digest, and Institutes are all one connected Work.

The Code was first published in the third Year of *Justinian*: The Digest was compiled before the Institutes: but published a Month after, in the seventh Year of *Justinian*.

The Proposition "that *any Kind of Interest*, at the *Time of subscribing*, could *not* afterwards be taken off;" and the Application of this Passage in Support of it, was much agitated in *Westminster-Hall*, and the whole Kingdom.

A Gentleman at the Bar, pursuing the Proposition through all it's Consequences, hit upon this Point — "That a *Charge upon Land* for Payment of *Debts*, would defeat the Will, if a subscribing Witness was a *Creditor* at the *Time of subscribing*." As soon as it occurred to him, he mentioned it to me. There had been many such *Devifés*: But the Question, "Whether the Witness was a *Creditor*, *never had been asked* at Law; nor by Interrogatories in *Chancery*, framed to establish or impeach a Will.

If the general Rule was right, the Deduction seemed very plausible.

He put this Point in Issue, in *Chancery*; and examined to it, in behalf of the Heir, in several Cases. Lord *Hereford's* Will was one of the first. *This* was another.

A Case soon happened which brought the general Proposition flung out by Lord Chief Justice *Lee*, under judicial Examination. On the 10th of February, 1746, the Earl of *Ailesbury* died; having made a Will, 15th May, 1745, (1)

(1) The Book says 1746, which Mistake it is observable the accurate Reporter has omitted in "Errors of the Press."

Case on the will of the Earl of Ailesbury. who died in Feb. 1746. It is noted that in b. to Dr. in the Rep. there is a case on the same will.



of his whole Estate real and personal, charged with Debts and Legacies: The three subscribing Witnesses, as being in his Service at his Death, had Legacies; one, 30*l.* a Year for Life; the other two, pecuniary Legacies. All three *released*, the 12th of February, 1746.

He had made a former Will, on the 20th of December, 1744, attested by three disinterested Persons; under which, the three subscribing Witnesses to the last Will would have had the same Legacies.

A Bill was brought in Chancery, to have the latter Will established, notwithstanding this Doubt; and stating the whole Matter; notwithstanding the Will of 1744, which the Testator had revoked, (as he thought, effectually,) and might probably have cancelled; it was a Benefit to the Witness, *at the Time of subscribing*, to have a Legacy under the *last* Will.

The Cause came on to be heard, the 5th of November, 1748. And I was of Counsel, in it.

I had taken the Liberty to ask Mr. Justice Denison, "Whether the Judgment of the Court, in the Case of *Anstey, v. Dowling*, went upon the *general* Proposition?" He told me it did *not*; but upon the *particular Circumstances*. As to himself, he was *not* of Opinion, "that an Objection of Benefit, at the Time of subscribing, *might not be taken off*, by being disinterested, at, or after the Death."

I mentioned this to the Lord Chancellor, who had got from Lord Chief Justice Lee, a Copy of the Opinion he delivered: And he was clear, "they *were* good Witnesses." At the Death of the Testator, it was indifferent to them, *which* Will prevailed: Besides, they had *released*: He declared the last Will, of the 15th of May, 1745, to be well proved, *established* it, and *decreed the Trust*.

There is another Matter touched in that Opinion delivered by Lord Chief Justice Lee, which interferes with the Rule I have laid down, in its *full* Extent: *viz.* "That a subscribing Witness who is a *several Devisee*, which Devise *as to him* must

must be void, shall not by his Subscription authenticate the Rest of the Will." But for this, no Authority is cited. In the Case of *Hilliard, v. Jennings*, the whole Land was devised to *William Hilliard*. And I am satisfied that Lord Chief Justice *Holt* took the Distinction. "That the Will might be only void, *quoad* the Devise to the Witness:" Because *Carth.* 514. who was Council in the Case, and has reported it the most correctly, *hints* an Expression of that Kind, *viz.* "That it was void *quoad* the Devise of the Lands to the Plaintiff." And Lord *Raymond*, in the Case of *Baugh, v. Holloway*, Wil. Rep. 557, 558. says *expressly*, that Lord Chief Justice *Holt* so determined.

The Validity of the Will, as to the *Personal Estate*, was not before the Court, and never could come before the Court, because *that* Question belonged to another Jurisdiction. The Case in Judgment was of a Devise to the Witness *only*. Lord Chief Justice *Holt* might, very properly, throw out something to guard against Inferences from their present Determination, to the Case of a Devise to a *third Person*.

I have looked into the Register-book, for that Case of *Baugh and Holloway*; and find the State of it to be this. *Richard Baugh* died leaving *Elizabeth* his Wife, and two Sons, named *John* and *George*; having first made his Will, dated 11 June, 1707, whereby he devised certain Premises to his youngest Son *George* his Heirs and Assigns, charged with the Payment of 200*l.* which was due on Bond to *Lancelot Baugh*, the Testator's younger Brother. And the said Testator also devised certain other Lands to the said *George*, with a Proviso that on the said *George's* attaining 21 and having 1000*l.* paid him, then all the said Premises should return to his eldest Son *John*. And in Case both his said Sons should die under 21 and unmarried, then the said Testator devised the said first mentioned Premises to his Wife *Elizabeth* her Heirs and Assigns, charged with the Payment of the said 200*l.* to the said *Lancelot Baugh*, and also with the Payment of 150*l.* to the said

Lancelot Baugh's Children; and devised the said last mentioned Premises to his Brother *Edward Baugh* his Heirs and Assigns. Both the Testator's Sons died without Issue, under Age: And *Elizabeth Baugh* possessed and enjoyed the said Premises under the said Will, and afterwards died, 20th October, 1714; having first made her Will, and devised the said first mentioned Premises to *Catherine Rawlins*, charged with the Payment of her Debts, and also subject to the said Charge made by her Husband's Will. *Catherine Rawlins* entered, and enjoyed the said Premises, and died; having made her Will dated 26 May, 1716, and devised the said Premises to *Anne Oxenden* and *Elizabeth Holloway* as Tenants in common, charged with the Payment of the Debts and Legacies appointed to be paid thereout by the said *Richard Baugh*, and also of the Debts, &c. of the said *Elizabeth* unsatisfied by the said *Catherine Rawlins*. The said *Anne Oxenden* and *Elizabeth Holloway* claimed the said Premises, as only Children of *John Holloway* by *Anne* his Wife, and as Co-heirs at Law of the said *Elizabeth Baugh* and *Catherine Rawlins*. *Lancelot Baugh* filed his Bill, and claimed as Uncle and Heir at Law of *John Baugh* the surviving Son of his Brother *Richard Baugh*; thereby impeaching his said Brother's Will.

The Order is stated right in *Wil. Rep.* 558. and on searching the Register's Book, it could not be found to have come on again. Therefore it is reasonable to think the Heir must have been advised to drop it.

Devises of Lands differ extremely from *Wills*. They are no Appointment of an Heir; they create no Representation; the Devisee does not stand in the Place of the Devisor, as to simple contract Debts; and till the Statute of 3 & 4 *W. & M.* (1) c. 14. the Devisee was not liable to Specialty Debts, (because he was considered as an Alienee, and not as the Heir.) They are Conveyances or Dispositions *Mortis Causâ*: And that is the Reason why a Man cannot devise Land which he shall afterwards acquire.

One

(1) Perpetuated by 6 & 7 *W. 3.* c. 14. s. 2.

One Devise may be void, (as in the Case of this very Will;) and the Devise of another Estate, good. There is no Probate of the whole Instrument: Every several Devisee must take out his Title, in a distinct Cause, and *de novo*, against every new Party.

Upon legal Principles, there is great Weight in the Distinction said to have been made by Lord Chief Justice *Holt*: And the Authors referred to by *Swinburne* are strong, upon the Reason and Fitness of the Thing.

The Danger of Fraud, from the Imagination "that four Witnesses might (1) divide the Estate among them," seems very chimerical. That very *Contrivance* would overturn the Will. If it would not; they might as well execute their Scheme, by four Devises, in four Paragraphs, severally attested.

Thirdly, In the third and last Place, I proposed to consider the present Case under it's *own* Circumstances.

These Witnesses are in the Nature of *Legatees*; not several *Devisees*.

The Presumption of "Interest at the Time of *Subscription*" is *taken off*, at the *Death*, by the principal Funds being more than sufficient: It is taken off, *before the Trial*, by the Debts being *paid*.

But the Benefit at the Time of subscribing was *nothing*. It does not appear the principal Funds *then* were deficient. The Legacy is a *bare Possibility*, upon a Contingency; which Contingency *never happened*.

But I will go farther, I think a Charge "*to pay Debts*" ought *not* to incapacitate subscribing Witnesses; *although* they wanted and claimed the Benefit of it. Every honest Man should make that Charge in his Will: He who omits it, is said to sin in his Grave.

E.

Fraud

(1) By contriving to attest, each for the three others, as to the Lands devised to those others; though none of them could be a good Witness as to the Devise to himself.

Fraud can not be presumed, from inserting a Clause which it would be iniquitous *not* to put in.

No Man would resort to wicked and fraudulent Practices, to get his Debt charged upon Land by the *Will* of his Debtor: If he suspected the Debtor's Circumstances, he would not stay 'till his Death, or trust to a *revocable* Security.

The Presumption of Fraud in this Case would be against Justice and Truth; and the public Inconvenience so great, that hardly a Will could stand.

This Charge ought to be in every Will.

The Persons attendant upon a dying Testator, and therefore most common Witnesses, are generally in *some* Degree *Creditors*; such as Servants, Parson, Attorney, Apothecary, &c. and the disallowing such Persons to be Witnesses cannot answer any Ends of public Utility.

Upon the whole we are all of Opinion, That this Will is *duly* attested by three Witnesses. Judgment for the Plaintiff.
Bur. Rep. 417. 2 *Burn's eccles. Law.* 533.

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Lord Chief Justice CAMDEN'S

A R G U M E N T, &c.

THE CHIEF, CHIEF CAMP

A RECORD OF THE

Lord Chief Justice *Camden's*
A R G U M E N T
 I N

Doe on the Demise of *Hindson*, &
Ux. & al. v. Kersey.

Delivered in

Easter Term, 5 Geo. 3, 1765. C. P.

The State of the Case.

This was a special Case upon an Ejectment of one Messuage, twenty Acres of Meadow, and twenty Acres of Pasture, with the Appurtenances, in Maulsmeabourn, in the Parish of Crosby Ravensworth, in the County of Westmorland. It was tried at Applebee Summer Assizes, 1760, before Mr. Justice Bathurst.

JOHAN KNOTT being seized in Fee-simple of a Messuage and other Tenements, made his Will in Writing on
 16th

The State of the Case.

16th August, 1734, in the Words and Figures following, that is to say,

“ In the Name of God, *Amen*, I JOHN KNOTT of *Maulsmeaburn* in the Parish of *Crosby Ravensworth*, and County of *Westmorland*, Yeoman, being of good Health in Body and of a disposing Mind and Memory, make this my last Will and Testament as followeth, hereby revoking all former Wills by me made; as to my temporal Estate which God in Mercy hath lent me, if, by his Providence, it is continued to me to the End of this my temporal Life, without a Necessity of selling or incumbering it, and that I have no Issue, then by God's Permission I dispose of it as follows: I give and devise unto *Isabel* my dear Wife my whole Estate of Lands, to have and to hold during her natural Life, but with this Proviso, that in Case there be Occasion to raise Money for the Payment of my just Debts after Sale made of what she can spare; I do hereby give unto her my said Wife as good and full Power and lawful Authority as I myself now have to sell and convey my eleven Grasses or Cattle Gates in the Lordship's Pasture, commonly called *Cow Close* and *Ox Close* (*viz.*) six whole Gates and two ancient half Gates belonging to the Estate I purchased of *Oliver Whitehead*, and four Gates I purchased of *Thomas Barrow*. Item, after the Decease of my Wife, I give and devise my Dwelling-house erected upon the Green in *Maulsmeaburn*, and the Barn and Byar I purchased of *Thomas Barrow*, and all the Lands now in my Possession which I bought of the said *Barrow*, by what Name or Names soever called, from *Meaburn* Green at the East End, to *Wicker Slack* Field at the West End, and adjoining to the Ground of *William Garnett* on the North Side (save that the Garth adjoins to *William Thwayter* and the Ing Croft to *Margaret Darby* Lands) and to the Ground of the said *William Garnett* and *John Knott* on the

South

South Side, to have and to hold the said Lands and Houses to my Trustees herein after named (whom I humbly desire to accept the said Trust) and to their Successors for ever, (*viz.*) *John White* of *Maulsmeaburn* my Brother-in-Law, *Christopher Moss* of the *Roans*, *Hervey Holme* of *Barneskew*, *William Dant* of *Frainland*, *Robert Burra* of *Dryevers*, and *William Burra* of *Maulsmeaburn*, and they the said Feoffees in Trust and their Successors for ever are desired, and hereby humbly required to lett or sett the said Houses and Lands, and yearly dispose of the Rents and Profits thereof at *Martinmas* and *Whitsuntide* in every Year after my said Wife's decease as hereafter desired and directed, and to no other Uses or Purposes whatsoever, namely, I desire and require my said Trustees with all possible Piety to dispose of the yearly Profits as aforesaid to such poor People within the Lordship of *Maulsmeaburn* (being legally settled therein) as I now name, that is to say, indigent Orphans under 10 Years of Age (which are yet unable to labour), to poor aged People (which are utterly past Labour), to poor impotent People which are lame or blind (which cannot labour), and to put out the Children of such poor People as above, either Sons or Daughters, Apprentices as soon as they are fit for it; *but* by no means to encourage any idle Persons that are able to labour; and I desire my said Trustees and their Successors to meet every half Year to make a Distribution of the Profits arising from the said Estate; and when it pleases God that any of them depart this Life I desire their Survivors, at their first Meeting, to nominate the fittest Persons in *Maulsmeaburn* Lordship, and never any out of it, to execute this Trust; and I desire my Trustees at their half yearly Meetings to take a moderate Refreshment out of the Profits of the said Estate not exceeding Four Pence a Man; and I most humbly beg that in case any Difference or Neglect should happen in future Times amongst my Trustees, that The Honourable *Robert Lowther*, Esq; his Heirs and Successors at *Maulsmeaburn*

Maulsmeaburn Hall, will be pleased to inspect this Affair and examine if a due Distribution has been made herein, and if otherwise to make due Regulations according to this my Desire and Design; and it is my Will and Desire that my Trustees require such of the Poor as receive any of this Charity as are of Ability to go to the Church every *Sunday*, or as often as they are able, and the Weather good; and I do desire and require my said Trustees to pay Five Shillings yearly and every Year to a proper Person that will keep the Dogs out of *Crosby Ravensworth* Church every *Sunday* during divine Service and Sermon; and I do desire and require my Trustees to pay yearly and every Year Five Pounds to the Master of the Free-School in *Crosby Ravensworth*: And I farther desire and require my said Trustees to take Care that the Houses and Fences belonging to the above devised Premises be kept in good Repair. Item, after the Decease of my Wife it is my Will, and I hereby give and Devise to my true and faithful Servant *Ann Gibson*, if she survive my Wife, the House (now a Stable) Barn and Byar, Garth, Ing Croft, Ing Croft Bottom, Croft Head, and Mainis Close which I purchased of *Oliver Whitehead*; the East-end opening to the Street in *Maulsmeaburn*, and the West-end adjoining to the Ground of *John Parkin*, and on the North Side adjoining to the Ground of The Honourable *Robert Lowther*, Esq; and on the South Side to the Ground of *William Sheppard*, senior, to have and To hold To the said *Ann Gibson* during her natural Life, or till the Day of her Marriage and no longer, for this Devise shall utterly cease and be void. Item, after the said *Ann Gibson*'s Decease or Marriage, I do hereby will, devise, and give unto my Sister *Mary Brown*, all the said House and Croft in full as above mentioned which I purchased of *Oliver Whitehead*, To have and To hold to my said Sister *Mary Brown*, during her natural Life: Item, after the Decease of my said Sister *Mary*, I do hereby Will devise and give unto *Ann Kebson* my Neice,
Daughter

Daughter to my said Sister *Mary Brown*, all the said House and Croft in full as above mentioned (to *Ann Gibson*) and which I purchased of *Oliver Whitehead*, To have and To hold unto the said *Ann Kebson* and her Heirs for ever. Item, I do hereby will, constitute and appoint my dear and loving Wife *Isabel* Executrix of this my last Will and Testament. Item, I do hereby will, order and appoint my Executrix to pay to *Ann Gibson* my Servant twenty Shillings yearly and every Year during their joint Lives, or till the Day of *Ann Gibson's* Marriage, upon which said Marriage-day, this Legacy is utterly to cease and be no more or longer paid. *John Knott's* Will, wrote by his own Hand on two half Sheets of Paper, the first written on both Sides, and a Part in the Margin. Dated 16th Day of *August*, 1734."

The Lessors of the Plaintiff claimed Title to the said Messuage and Tenements in Right of *Agnes*, Wife of the Lessor *Samuel Hindson*, *Mary*, Wife of the Lessor *Thomas Langhorn*, and *Elizabeth*, Wife of the Lessor *Thomas Cowper*, as being Cousins, and Co-heirs of the said Testator *John Knott*.

The said Defendant *Elizabeth Kersey* claimed under the said *Ann Gibson* whom she (*Kersey*) insisted was intitled during her (*Gibson's*) Life, or till her Day of Marriage, to the said Messuage and Tenement under the Will of the said Testator *John Knott*.

On the Trial of this Ejectment it appeared in the Course of the Evidence, " That the said *John Knott* afterwards, to wit, on the 19th Day of *October*, 1746, at *Maulsmeaburn* in the said County of *Westmorland* died seized of the said Messuage and other Tenements as aforesaid; and that the said paper Writing was signed, sealed, and published by the said *John Knott*, in the Presence of the said *Henry Holme*, *Robert Burra*, and

John Mitchell, whose Names were subscribed thereunto in the Presence of the said *John Knott* the Testator; and it also appeared, that the said *Isabel*, the Wife of the said *John Knott*, died on or about the 24th Day of *December*, in the Year 1756, and that on her Decease the said *Ann Gibson* entered upon the House, Lands, and other Premises devised to her by the said Will, and that she is now living and unmarried; and that the said *Henry Holme* and *Robert Burra* were two of the Devisees in the said Will upon the Trusts therein mentioned, and were two of the three Persons who attested the Execution of the said paper Writing purporting to be the Will of the said *John Knott*; and that the said *Henry Holme* and *Robert Burra* at the Time of the publishing and attesting of the said paper Writing and the said *Henry Holme*, *Robert Burra*, and *John Mitchell* at the Time of the Decease of the said *John Knott* the Testator, and at the Time of their attesting the said paper Writing, and continually from that Time, and long after the Decease of the said Testator, were respectively seized in Fee simple of divers Messuages, Lands, and Hereditaments, lying within the said Lordship and Township of *Maulsmeaburn* afore said, and that during the whole Time afore said, they severally were possessed of, and occupied the same, and inhabited, within the said Lordship and Township; and that the said Lordship and Township was, and is, a large District, and from Time immemorial contained a great Number of Inhabitants, and laid within the Parish of *Crosby Ravensworth* afore said, and maintained their own Poor separate and apart from the Parish of *Crosby Ravensworth*; and, that they severally, for all the Time afore said, were chargeable and taxable; and were actually assessed, taxed, and paid towards the Poor, and unto all other the Taxes of the said Lordship and Township of *Maulsmeaburn* afore said; and it appeared that, before the Time of the said Trial, the said *Henry Holme*, and *Robert Burra*, had respectively released all their Interest under the said paper Writing, purporting to be the Will of the said

John

John Knott, to the other Trustees therein named ; and also, that the said *Henry Holme*, *Robert Burra*, and *John Mitchell*, had severally conveyed away, and disposed of all their respective Estates and Interests in their said Messuages, Lands, and Hereditaments, lying within the said Lordship and Township, before the Time of the said Trial. It also appeared, that the said paper Writing was signed by the said *John Knott* before the making of the Statute of the 9 Geo. 2. c. 36. intituled, "An Act to restrain the Disposition of Lands, whereby the same become unalienable;" but the said *John Knott* lived till long after the 24th Day of June, 1736, being the Day from which the said Statute was appointed to take effect, whereupon a Verdict was given for the Plaintiff, subject to the Opinion of the Court of *Common Pleas*; and the Question reserved for the Consideration of the Court was,

"Whether under the Circumstances of this Case, the said paper Writing, purporting to be the Will of the said *John Knott*, was sufficient and effectual to pass the said Messuage, Lands, and Tenements of the said *John Knott*, unto the said *Ann Gibson* (who survived the Testator's Wife) during her Life, or until the Day of her Marriage; and if the Court should be of Opinion with the Lessors of the Plaintiff, they are to be at Liberty to sign Judgment, and take out Execution thereon with Costs; but if the Court should be of Opinion with the Defendant, then the Lessors of the Plaintiff are to pay Costs as of a Nonsuit.

Lord (a) *Camden* delivered his Opinion to the following Effect.

Two Questions arise out of this Will.

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I. Whether

(a) His Lordship's Title then was only "The Right Honourable Sir *Charles Pratt*, Knight.

1. Whether it is executed according to the Statute of (a) Frauds?

2. If not, whether the Objection to it is cured by the late (b) Act?

The particular Question under the Statute of Frauds, is,

Whether the Witnesses are *credible*?

To clear which, the following Points must be taken into Consideration.

1st. Who are those Witnesses described in the Act by the Word *credible*?

2d. Whether the Witnesses here come within that Description?

3d. Whether this Non-credibility can be purged by any Matter *ex post Facto*, so as to establish the Will?

4th. Whether allowing they cannot be admitted to prove their own Legacies, they may be let in to the other Devices wherein they have no Interest?

Upon some of these Questions I shall be obliged to differ with the Opinion of the Court of *King's Bench* delivered by Lord *Mansfield* in the Case of *Wyndham, v. Chetwynd*, or rather, (for so I wish to put it,) I shall agree with the Judgment of the same Court (c) delivered by Lord Chief Justice *Lee*: For as both the Opinions are justified by Authorities of equal Weight,

(a) 29 Car. 2. c. 3. perpetuated by 1 Jac. 2. c. 17. s. 5.

(b) 25 G. 2. c. 6.

(c) That Opinion was delivered on Tuesday 22d April, 1746, Easter Term, 19 G. 2. Bur. Rep. 425. 2 Stra. 1253.

L. C. J. Camden's Argument.

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Weight, a Man may take either Side without hazarding his Reputation — *Magno se Judice quisque tuetur* — I had rather have it said that I concur with one great Judge, than that I dissent from another.

The Course I shall pursue is this.

1st. I shall endeavour to give you the Scope of Lord *Mansfield's* Argument as I understand it.

2d. Then I shall lay down the Method in which I shall treat the Subject, and while I am establishing my own Propositions I will endeavour to answer the Argument on the other Side, as it falls in my Way.

His Lordship's Method of arguing, as far as I am able to collect it, I take to be this.

He first affirms, that this Attestation of three Witnesses is mere Form, in which Light the Judges should always endeavour to get over the Objection in Favour of Wills.

And many Instances to this Purpose are cited, shewing how liberally they have dealt with the Statute where the Objection was formal only.

Then with respect to the Clause itself, he insists that this is not a Question of Construction upon any Words of the Statute. For that no Stress ought to be laid upon the word *credible*, which is either *misapplied* or nugatory as *included in the Word Witnesses*.

That the whole Clause indeed is ill penned and inaccurate, and the World under a great Mistake in thinking it was drawn
by

by Lord *Hale*, in which respect a Judge may take greater Liberties with it, than he otherwise could do.

That the Legislature could not seriously mean to prevent Frauds by this Direction, for though it might be some Guard in Theory it was hardly any in Practice: They only meant to make the Execution something more formal than it was before.

That the Statute being deprived of the Word *credible*, the other Word *Witness* was to be expounded by Common Law Analogy.

From whence this Rule was taken, that as at Common Law no Man was allowed to be a Witness to prove an Interest for himself; so, since the Statute, no Man shall by his own Subscription take an Interest which he could not prove at the Time by his own Examination.

That the Case of *Hilliard, v. Jennings* goes no farther.

From the Rule they framed, his Lordship is pleased to conclude, not only,

That a Release or Payment will re-establish the Witness, if his Incompetency really stands in the Way; but still farther,

That such a Witness may even without a Release be competent enough to prove the Will for every Person except himself.

In Opposition to this Reasoning I propose to maintain,

1st. That this Credibility, which I shall prove to be Competency, is a necessary and substantial Qualification of the Witness at the Time of Attestation.

2d. That

2d. That if the Witness is incompetent at that Time, he cannot purge himself afterwards, either by Release or Payment, so as to set up the Will.

3d. That he cannot be a Witness in that Case to establish any Part of the Will, but that the whole is void for ever.

As my Brothers differ with me upon the second Question, by holding that the Witnesses are competent by the Rule of Law, I might, if I thought it fitting, leave all the other Points undiscussed, as not absolutely necessary to the Decision of this Case; and I should have been glad for several Reasons to have done it, if other Reasons more weighty with me, had not determined me the other Way.

One is, that as the whole Argument is connected by a Chain, those Parts whereon I am bound to speak could not be so clearly illustrated, nor would they, as I apprehend, be urged with half the Force if the others were omitted, for they do all throw Light upon each other, and the former are proper and material Introductions to the latter.

Another is, that as the same Case may again exist and even this Case may yet come before another Court, and likewise, as no Cases of the like Kind, in my Opinion, are cured by the late (a) Act, but that future Wills as well as those that are past under such like Attestations, must occasion the same Questions, when they happen to be contested; I think myself bound in Duty to declare my Dissent to the last Opinion of Lord Mansfield, and do my best Endeavours to restore Lord Chief Justice Lee's, which has been so considerably shaken, I may say overturned, because the last (b) Opinion, if it is acquiesced under, almost always governs and becomes the leading Case.

So

(a) 25 G. 2. c. 6.

(b) *Judicia posteriora sunt in Lege fortiora.* 8 Co. 97.

So that if I should now decline this Argument, my Silence would be construed into an Assent to Lord *Mansfield's* Doctrine, which I am clearly satisfied is ERRONEOUS.

These Reasons no Doubt prevailed upon his Lordship to declare himself against Lord Chief Justice *Lee* in a Case where, according to his own Opinion, he might have avoided the Question, and yet have pronounced the same Judgment; but he thought it more manly to meet a Principle in open Combat which he thought wrong, than to give further Strength to that Error by avoiding the Contest.

I have hitherto treated the Argument I am answering, and I am obliged to treat it throughout, as Lord *Mansfield's* Argument, and not the Argument of the Court, because his Lordship has told us it is his own, and he is personally answerable for all its ERRORS; as for the Opinion of the Court, he only tells us in general they held the Will duly executed according to the Statute, but has not informed us upon what Grounds that Resolution was framed; so that I am not able to say whether the Puisne (a) Judges agree with his Lordship in all his three Grounds, or if not in all, in which of those three; nor do I think it right now to enquire, because the Practice of explaining a public Resolution in private by Parol might be attended with some bad Consequences.

I must therefore bespeak your Patience, for I am afraid I shall be very tedious; if I should, it must be imputed to the high Respect I bear to that great Person with whom I differ, as it would be an unpardonable Neglect to pass over or disregard even a single Word that he has thought material.

I am very sensible that I am destroying an honest Will upon a nominal Objection, for the Interest here which I must treat as a serious Incapacity, is too slight even to disparage the
Witness's

(a) *Wright, Denison, and Fossor. 2 Str. 1253.*

Witness's Credit, if he could be sworn, and yet I must adjudge him, upon this Objection, to be a Person so destitute of all Credit that he is not fit even to be examined; but as it is not my Business to decide Cases by my (a) own Rule of Justice, but to declare the Law as I find it laid down, if the Statute of Frauds has enjoined this Determination, it is not my Opinion but the Judgment of the Legislature.

As I am satisfied, however, that this Will was fairly executed, I am very glad my Brothers, by differing with me, have enabled me to give Judgment in Favour of it, against my own Opinion.

Before I proceed I desire it may be understood that I do by no Means deny the Authority of the Judgment in *Wyndham, v. Chetwynd*, for that Case was not determined only upon the general Principles, which I am obliged in this Argument to deny, but upon it's own general as well as particular Circumstances, none of which can be applied to the Case of a mere Legatee Witness.

The first general Question then, or rather Inquiry, being this, who are those Witnesses which are described in the Act by the Word *credible*?

I answer, in one Word, they are *competent* Witnesses and no other.

And when it is further asked at what Time must the Witness be indued with this Qualification?

I say that he must be clothed with it at the Time of Attestation.

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This

(a) *Judex bonus Nihil ex Arbitrio suo faciat, nec Proposita domestica Voluntatis, sed juxta Leges & Jura pronunciet.* 7 Co. 27. a. Calvin's Case.

This then is the Proposition that I mean to maintain.

That the Witness's *Credibility* (which I shall prove to be *Competency*) is a necessary and substantial Qualification *at the Time of attesting*.

To establish this, it will be incumbent on me to prove, that the Legislature set up these Witnesses as a Guard to protect the Testator from Fraud in that critical Minute, when he was about to execute his Will; which I will do from the Spirit as well as the Words of the Statute, and shall then confirm my Construction by the Authority of *Hilliard, v. Jennings*, which is a Case in Point upon this Question.

In the Out-set I beg leave to make one Observation, which I desire may be attended to, because it should be carefully kept in View throughout the whole Argument, and it is this.

That there is a great Difference between the Method of *proving* a Fact in a Court of Justice and the *Attestation* of that Fact at the Time it happens, these two Things I suspect have been confounded; whereas it ought always to be remembered that the great Inquiry upon this Question is, how the Will ought to be *attested*, and not how it ought to be *proved*.

The new Thing introduced by this (a) Statute is the Attestation, the Method of proving this Attestation stands as it did upon the old Common Law Principles.

Thus for Instance, one Witness is sufficient to prove what all the three have attested, and though that Witness must be a Subscriber, yet that is owing to the general common Law Rule, that where a Witness has subscribed an Instrument he must be always produced, because it is the best Evidence. This we

(a) 29 Car. 2. c. 3. perpetuated by 1 Jac. 2. c. 17. s. 5.

see in common Experience, for after the first Witness has been examined, the Will is always read, and in the Case of *Hilliard, v. Jennings*, you will find that the Objection was not to the Want of due Proof in Court, but whether the Devisee was a credible Witness within the Meaning of the Statute?

This I am afraid has not always been attended to, but some Persons have been apt to reason upon this Point as if the Statute had directed the Will to be *proved* by three credible Witnesses, forgetting the Difference between the *Subscription*, and the *Proof* of that Subscription.

I proceed now to shew that the Witnesses must be credible *at the Time of Attestation*, within the true Intent and Meaning of the Act.

This Clause has introduced a new Ceremony to be observed in the Publication of Wills. *This Act of Publication is to be done before three credible Witnesses.* This I call the Substance, because these are the Acts to be done by the Parties; when this is done by the Testator, and has been seen and heard by the Witnesses; then,

The Testator is to sign, and the Witnesses are to subscribe, in the Presence of the Testator.

This is the Form.

The Difference is apparent, for the Signing and Subscription in the Presence of the Testator, is only the Mode of recording the Act, by committing it to Writing at that Time; and though the formal as well as the substantial Part are equally essential to the Perfection of the Will, yet Judges may fairly be more liberal with the Form, than they can with the Substance.

Now if the Question be asked, whether the *Quality* of Credibility is requisite in the Witness at the Time of Attestation? I answer, nothing can be more clear upon the Words, *if Credibility means any Thing*, for what is the Clause but a Description of those Solemnities that are to attend the Execution? among which the Presence of credible Witnesses is made necessary. It is admitted, that if any other Description had been added to the Witnesses, that must have belonged to them at the Time; as if three *Englishmen*, or three full aged Persons had been required, these Adjuncts would have been necessary at the Time, and if so, I see not by what Rule of Construction one Epithet or Adjunct can be distinguished from another.

Nay, if the Word *credible* be expunged, and the Word *Witness*, as it is admitted, does *ex Vi Terminum* include *competent*, still Competency must be essential to the Witness at the Time of Execution; so *Quâcunque Vid data*, an interested Witness cannot be the Witness the Law intends to be present at the Execution.

But this it may be said is cavilling upon Words, and an Artifice to evade the true Question which turns upon the Spirit and Intention of the Law; for if the Solemnity was not really introduced to protect the Testator from Fraud, but only to add a little more Form to Will-making, the Court ought to attend more to the Number than the Quality of the Witnesses, and the Law will be satisfied if they are made *credible at the Trial*.

Now although this Construction will be a manifest Violence upon the Words, yet I will meet the Argument fairly upon the great Ground and maintain my Opinion upon the very Spirit and Intention of the Act.

I say

I say then, that the Legislature ordained, and meant to ordain, the three Witnesses to be a Guard to the Testator against Fraud, *at the Time of executing the Will*, and that the Witnesses are called in not only to *attest*, but to *protect*.

This is the true State of the Question between us; say the other Side, *credible* signifies Nothing, the whole Business is mere Form; so little has the Statute to do with this Point that the Question is not a Question of Construction upon any Words of it.

I must, on the Contrary, maintain it to be a Question of Construction; to say the Truth, the Point must either Way turn upon the Construction; if the Statute determines the Question, it is simply a Question of Construction; and if it is to be laid aside, you must still construe the Statute to get rid of it.

But to proceed.

Before the Statute of Frauds, any Scrap of Writing, though it was neither signed, sealed, nor written by the Testator, might have been established by the Testimony of one single Witness; nay though this Person was a Legatee, if he released, he was a good Witness.

This did in Fact happen in a very remarkable Case, that of Sir Francis (a) *Worfeley's Will*.

One *Baynham* of *Gray's Inn*, wrote a Will for Sir Francis *Worfeley*, which Will was in loose Sheets, dictated, as *Baynham*

(a) This Case is reported in *Sid.* 315. pl. 33. 2 *Keb. Rep.* 128. pl. 82. by the Name of *Stephen Leslee of Gerard, v. Lord Manchester*, 18 Car. 2.

bam said, by Sir *Francis*, who had neither signed nor sealed the same, though the Writing itself purported both; but Sir *Francis*, who intended to write the same over again himself, said, that in the mean Time that should be his Will; *Baynham* was the *only Witness* to all this Transaction, and he was a *Trustee*, a *Legatee*, and an *Annuitant under the same Will*; an Objection was taken to *Baynham's* Testimony as a *Legatee*, whereupon they shewed a Release, and proved that he had received the Money.

And yet, says *Keble*, the Court conceived this a sufficient Will, and the Jury found it so, and Verdict *pro* Defendant, Lessee of his Bastard, against the true Heir at Law, Lessor of the Plaintiff.

This Determination was clearly legal at that Time, yet the Reporter thought (as every other Person that reads it must) that it was a Case of great Hardship, to disinherit the Heir by a Will so made and so attested, the same Person being Drawer, Legatee, and Witness.

The two great and alarming Considerations upon this Case were these, that such an unfinished Paper should be deemed a Will, and that one Person, *so interested*, should be the *only Witness*.

All the World must see as soon as this Case was determined, that Testators would be delivered up to the Practices of crafty and designing Men, if such Wills and such Witnesses were suffered to prevail any longer, the Testimony was rather worse than the Will: Unless any Man can think that a wicked Will becomes honest by the Witness's sealing a Release, when that very Release that lets in his Evidence, establishes the Fraud.

Whether

Whether this Case was in Truth the Occasion of the Will-clause in the Statute of Frauds, as some have thought, I do not know; but when you reflect that this Case happened in 18 Car. 2. the Law made but eleven Years after, which is no great Length of Time to prepare, digest, and finish this noble Law, which deserves to be called a Code, rather than a single Act of Parliament. And when it is found by the Provision of this new Law, that for the future the Will is to be a perfect Instrument signed by the Testator. And that three credible Witnesses, at the least, are introduced to be present at the Transaction, pointing directly at the two Grievances in Sir Francis Worfeley's Case and going no further. The Provision is so remarkably adapted to meet with that Case, that I cannot be brought to believe it was either neglected or forgot. However that may be, I am at least sure that this was a most material Case to shew the Necessity of this Provision.

The Clause of the Statute is made in the following Words.

“ All Devises and Bequests of any Lands or Tenements shall be in Writing, and signed by the Party so devising the same, or by some other Person in his Presence, and by his express Directions, and shall be attested and subscribed in the Presence of the Devisor, by three or four *credible* Witnesses, or else they shall be utterly void and of none Effect.” Stat. 29 Car. 2. c. 3. f. 5.

Now that the Statute had a main View to the Quality of the Witness will appear from this Consideration, *viz.* That a Will is the only Instrument in it required to be attested by subscribing Witnesses, at the Time of the Execution; it was enough for Leases and all other Conveyances, Marriage Agree-

Agreements, Declarations, and Assignments of Trust, to be in Writing: These were all Transactions of Health, and protected by valuable Considerations and antecedent Treaties; the Power of a Court of Equity was fully sufficient to meet with every Fraud that could be practiced in these Cases, after the Contract was reduced into Writing.

But a Will was a voluntary Disposition, the arbitrary capricious Pleasure of the Testator, executed suddenly in the last Sickness almost in *Articulo Mortis*.

If the Man is, sane, his Will must be established; Cruelty, Ingratitude; unnatural Preferences, or Exclusions are no Objections to such a Will, *flat pro Ratione Voluntas*, was the Testator in his Senses when he made it? is the only Question that can be asked, and consequently *the Time of the Execution* is the critical Minute that *requires Guard and Protection*.

Here you see the Reason why Witnesses are called in so emphatically.

What Fraud are they to prevent?

Even that Fraud so commonly practiced upon dying Men, whose Hands have survived their Heads; who have still Strength enough to write a Name, or make a Mark, though the Capacity of disposing is dead; what is the Condition of such an Object in the Power of a few who are suffered to attend him, wheedled or teized into Submission for the Sake of a little Ease? Put to the laborious Task of recollecting the full State of all his Affairs, and to weigh the just Merits and Demerits of those who belong to him, by remembering all and forgetting none.

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Such an Act to be done at such a Time is so pregnant with Suspicion, that a formal Declaration of the Testator's sound and disposing Mind and Memory, though he is weak in Body, is grown to be a common introductory Clause to almost every Testament.

Who then shall secure the Testator in this important Moment from Imposition? Who shall protect the Heir at Law, and give the World a satisfactory Evidence that he was sane?

The Statute says three credible Witnesses. What is their Employment? I say, to inspect and judge of the Testator's Sanity before they attest. If he is not capable, the Witnesses ought to remonstrate and refuse their Attestation; they are infamous if they do not; in all other Cases the Witnesses are passive, here they are active, and in Truth the principal Parties to the Transaction; the Testator is intrusted to their Care.

Sanity is the great Fact the Witness is to speak to when he comes to prove the Attestation; and that is the true Reason why a Will can never be proved as an Exhibit *viva Voce* in Chancery, though a Deed may; for there must be Liberty to cross examine to this Fact of Sanity, from the same Consideration it is become the invariable Practice of that Court, never to establish a Will unless all the Witnesses are examined; because the Heir has a right to Proof of Sanity from every one of them, whom the Statute has placed about his Ancestor.

This Practice, which is co-eval with the Statute, is a strong Argument to shew that the Parliament called in the Witnesses to prevent insane Dispositions, and that their Business therefore is not barely to attest, but to try, judge,

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and

and *determine* whether the Testator is *compos* to sign and publish.

And yet this Duty of the Witness, this solemn Trial of the Testator's Sanity has been called a Matter of Form, and of no Use to prevent Frauds.

I am of a very contrary Opinion. It is not a very easy Thing to procure three disinterested Witnesses to attest the Will of a *Non-compos*. That many fraudulent Wills have been made since the Statute, and all formally executed, I have no Doubt; and I am afraid these Frauds will continue to the End of Time, for what Law can totally extinguish Wickedness and reform Mankind? But if a Law is to be slighted because it does not intirely eradicate the Mischief it was made to prevent, no Law whatever can escape Censure. Many bad Wills have been made; but, who can tell me how many have been prevented?

The Design of this Statute was to prevent Wills that ought not to be made, and always operates silently by Intestacy. I have no Doubt (for this Assertion cannot be proved) but that a thousand Estates have been saved by this excellent Provision. It is called a Guard in Theory only, whereas almost every desirous Paralytic that is suffered to die intestate is preserved by this Law, and gives Testimony of it's Utility.

But if you once treat this Part of the Solemnity as a Form, and call the Devisees and Legatees into the sick Man's Chamber, the whole Ceremony will then, I admit, become a mere Form; nay it will be worse, it will be a Snare to the Testator, and instead of being a Prevention, it will be a Protection of Fraud.

I will

I will close this Reasoning with the Words of the Court in *Lea, v. Libb*, as reported in *Carth.* 37.

“ 'Tis true, the Intent of the Statute was to prevent Fraud, but though no Suspicion of Fraud appears in this Case, yet the Statute hath prescribed a certain Method which every one ought to pursue to prevent Fraud.” (a)

If this is the true Language of the Statute of Frauds; the Consequence is undeniable, that the Incompetency can never be purged, and that the *whole Will is void for ever*.

This Consequence is so plain, that the Argument on the other Side, in order to call off the Attention from this Idea of Fraud, has laboured to disparage and enervate the whole Clause; with this View it is urged that the Word *credible* (which I consider as the Key of the Clause) deserves no Notice, but ought to be expunged, being, as it is contended, either improper or at least nugatory, nor does the Argument stop there, but proceeds to pronounce the whole Clause loosely and inaccurately penned.

So that at last this famous Law, every Line whereof, according to Lord (b) *Nottingham's* Opinion, was worth a Subsidy, turns out to be careless and ill penned, Nothing more than a fruitless, an ineffectual Solemnity.

But to proceed.

First, the Word *credible*, it is said, either means too much, and is misapplied, or else it is included in the Word *Witness*,
H 2 and

(a) Mr. Justice *Dolben* said “ It would be of dangerous Consequence to make so wide a Breach in the Statute.” *Comb.* 176.

(b) Lord Keeper *North's* Life, 109.

and means Nothing. That the Epithet *credible* has a precise Meaning universally allowed, and is *never* used as *synonymous* to *Competency*. That when it is applied to Testimony it presupposes Evidence to have been given, and after the Competency of the Witness is allowed, the Objection to his Credibility arises. In this Sense it is absurd to apply a Quality to the Witness at the Time of Attestation, which can never belong to him 'till his Testimony is examined in Court.

As the Argument here turns altogether upon the Meaning of this Word, I wish it had given us that precise Meaning which seems universally allowed. That is not done by any Definition; it was thought so plain and obvious that there was no Occasion for it, and therefore instead of telling us what the Word does mean, the Argument is pleased to assert what it does not mean: *i. e.* It is *never* used as *synonymous* to *competent*.

In Answer to which I beg Leave to say, that it may even in common Speech be so used; and further, in this Statute it must have that Meaning and no other.

And that this is not a *Gratis Dictum* will appear from the Case of *Hilliard, v. Jennings*, wherein the Court of *King's Bench* not only declared the two Words *credible* and *competent* to mean the same Thing, but rested their main Argument upon *that* very Meaning of the Word *credible*.

But of this more hereafter; in the mean Time I will endeavour to explain the Sense of this Word *credible* as I understand it; and hope to shew that the Statute has used it very properly, and that it is not misapplied.

I under-

I understand the Word *credible* to mean *worthy of Credit*. When applied to the Person of a Witness, it bespeaks him to be a Person of Capacity to deserve Credit. I say of Capacity to deserve it, I go no further, because no Man can be sure of obtaining Credit let him be ever so *credible*; and therefore I suspect that the Word *credible* has been used improperly in the last Passage for Credit, which means a great deal more.

Now a Witness is *credible* in two Senses.

1st. When this Quality is predicted of him, or denied to him in the Abstract, without referring to the Testimony of any particular Fact.

2d. He is *credible*, or not, in another Sense, when the Matter of his Testimony, in a particular Case, comes to be discussed and tried.

A Man therefore may be *credible* in the first Sense, though not *credible* in the second, and yet the Word properly used in both.

When you apply this Epithet to legal Witnesses, that Law, where it is so applied, must determine the Meaning.

Now, if I ask this general Question, who are *credible* Witnesses by the Law of *England*, *i. e.* Persons worthy to obtain Credit? If the Question is not absurd, I can give but one Answer to it; All such Persons as are permitted to give Testimony in the Courts of Justice: Who not *credible*? Those who are not permitted.

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The very Admittance of the Person to be examined, proves him, in the Estimation of Law, worthy of Credit, while he stands unimpeached by calling him *competent*.

But when a Witness's Testimony is under Trial, and I am asked, whether such a Deponent is a *credible* Witness to those Facts? I must take in a thousand Circumstances in order to judge fairly of his Credibility *quoad hoc*.

In this Case I admit that you presuppose the Evidence given, because his Credibility then depends not only upon his personal Character, but likewise upon the Evidence given with many other Circumstances.

This general Character of Credibility in the Abstract, is so inseparable to the Person of a disinterested Witness, that Nothing but an infamous Judgment can ever deprive him of it: He is disbelieved in one Cause, he is notwithstanding a *credible* Witness in the next; he fails there, yet in a third he may obtain Credit; let his Conduct or general Character be what it will, he is a *credible* Witness to every Fact wherein he has no Interest.

When I say that all indifferent Witnesses are *credible*, I do not mean equally so, for Credibility may have it's Degrees, his Rank or Character may make him more or less *credible*, but it is sufficient for my Purpose if the worst is intitled to any Degree of Credibility.

Now where a Man's Testimony is impeached, this general Character of Credibility is no longer considered otherwise than as a Circumstance, and the Inquiry is changed into a Scrutiny of his Credibility to that particular Fact. And here Men of all Ranks, Character, and Fortunes are equally liable to the same

same Inquiry; it is by no Means a Consequence that the best Man should turn out the most *credible* Witness, every Day's Experience proves the contrary, and a bad Man is not only allowed to be a good Witness, but some Times even a better than a much better Man.

In this Place it is proper to observe, that the good Character of the Man has been confounded with the Credibility of the Witness, which are two different Things, for the Statute was never so simple as to require the Attestation of honest Men, a Matter impossible either to be known or tried, but only demanded indifferent Witnesses, a Description equally understood, and plainly triable; indeed, every Man living is honest enough to tell the Truth for a third Person, if he has no Motive to do otherwise.

Nor is it strange, that a bad Man, in some Cases, should be a *credible* Witness, and a good one not credible; for Credit is not in the Power of the Witness, but is lodged in the third Person, and is a Matter of the nicest and most difficult Discussion.

The slightest Circumstance may turn the Balance; Probability in the Tale, collateral Confirmations, or Impeachment by other Evidence, contrary Declarations, Tamperings, the confident or modest Demeanor of the Witness, Hesitation, Confusion, Prevarication, Self-contradiction, compared with the contrary Behaviour: These, and many other Considerations, conspire to create or destroy Belief; and therefore the general Character of the Man is of no great Moment in weighing the Credibility of his Testimony; for I appeal to Experience, whether general Character is ever called in to impeach a Person's Evidence, till some strong Attack, from another Quarter, is made to his Credit? and therefore, every Man, without Exception, who
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is free from all Interest in the Fact he comes to attest, is a *credible* Witness, *i. e.* he deserves Credit; nay he is always believed, unless some other Objection, besides Character, is raised against his Testimony.

Thus much being premised, give me Leave to apply this Reasoning to the Statute before us. Who are those *credible* Witnesses who are called upon to attest? The Answer is plain; those who are intitled to the general Character of Credibility; who are free from Infamy and disinterested; who can neither get or lose by the Will. In this Sense, and in this only, can the Word possibly be understood, and therefore it is so far from being true, that *credible* is *never* used as *synonymous* to *competent*, that on the contrary, wheresoever it is considered in the Abstract, and applied to the Idea of legal Witnesses, it must be always *synonymous* to *competent*.

It is worth observing here, that Credibility is so inseparable to all Men who have their Senses, that the Epithet *incredible*, is never applied in common Language to the Person as it is to his Testimony; you say a Fact is *incredible*, as well as *credible*, but you never say a Witness is an *incredible* Person. For there is not any Man breathing who is not capable, though perhaps not worthy to obtain Credit, if you hear his Testimony. And indeed the true Reason why infamous and interested Witnesses are rejected, is, for fear they should be believed, and therefore such Persons are properly called *incompetent*, and not *incredible*, which Mode of Expression introduced *competent* in Law Language, as the apposite instead of *credible*.

When the Statute then requires three *credible* Witnesses (for it does not say three reputable Persons) to subscribe, it requires
three

three disinterested Persons, who are not infamous, and no more.

All such are *credible* to that Fact wherein they have no Interest; this may be pronounced of the worst Man, and you can say no more of the best, for they are both *credible* as they stand upon the Will, though perhaps not in the same Degree.

1st. The Acts which direct Convictions to be made upon the Oaths of *credible* Witnesses, mean *competent*, as I conceive; and if the Witness has no Interest, the Magistrate ought to convict, if he is not contradicted. This cannot be denied; and I am sure the Reason given why the Informer cannot be a Witness, is, because he is not *credible*, which proves pretty clearly, that if he had no Interest he would be *credible*.

2d. And though Lord Coke when he advises the Testator to call *credible* Witnesses to attest his Will, may mean to recommend the most *credible*, such as are reputable Persons, as well as *competent* Witnesses; yet there is no Ground to infer from the Expression, that any *competent* Witness in his Opinion was totally non-credible.

But if this be the true Meaning of the Word, then they contend that it is an idle nugatory Word, as being included in *Witness*.

Admit it for a Moment, must the Clause be condemned, or lose any of it's Weight, because an Epithet might have been omitted? How few Laws could escape Censure, if any synonymous Words should prove it guilty of Inaccuracy? I should rather think that the contrary ought to be presumed, because this Tautology generally proceeds from abundant Caution: The Writer thinking it safer to over load the Sen-

tence with many impertinent Words, than to omit one material Syllable.

But I shall not be satisfied with this Apology, because I apprehend that the Word *credible*, upon further Examination, will turn out to be not only proper but extremely useful in this Place. For, suppose the Parliament had reasoned in this Way while they were settling the Clause. The Word Witness alone, according to the best Construction, may perhaps be determined to mean the same as *credible* Witness; for over Intention to protect the Testator from Fraud, will naturally lead to such a Construction. But suppose some future Interpreter, if *credible* is omitted, should take Advantage from the Omission to expound the Law contrary to our Intention; suppose he should argue from hence that the Statute, by adding no Qualification to the Witness, has shewn that we never meant to provide against Fraud by this Attestation: That therefore this Part of the Ceremony is mere Form, and that the Common Law Method of dealing with Witnesses ought to be adapted to this Statute, by which the incompetent Witness may be restored by a Release or Payment. I will not say that this Difficulty did actually occur to the Penmen of this Clause; but this I can say with great Confidence, that they who have thus commented on this Clause, in Spite of the Word *credible*, would have argued more plausibly if *that* Word had been omitted; whereas, now, by the Assistance of this Epithet, we are sure from express Words that the Witness must be *competent at the Time*, or else the Will is void. Such a Word then may fairly be deemed both proper and material, if it serves to make a Passage clear, which without it would be obscure and ambiguous.

Not barely *three Witnesses*, not three *competent* Persons, in a loose Sense of the Word, are Witnesses: Not three *Bayn-hams*, first bribed by a Legacy to join in the Fraud, and then
bribed

bribed again by Payment to fix it; but three *credible, i. e.* unattainted, disinterested Witnesses.

The Words so used, to say no more, strongly mark out the Sense of the Legislature, and call upon the Attention of the Court to that *competent* Qualification of the Witness at the Time. In my Opinion, therefore, the Word has a strong, significant, and forcible Meaning.

Neither can I be brought to think the Clause so inaccurate in other Particulars as it hath been described; some few Questions indeed have sprung out of it, but they are all Questions of Subtilty, and such as might have been drawn out of the best chosen Words; Pen a Clause how you will, there will be always Room for liberal Construction to enlarge, and rigid Construction to restrain; that and no more has been done on the present Clause: In the formal Part the Judges have been liberal, they have gone as far, and perhaps farther, than the Words will bear, to establish the Will, where the Want of Formality was only objected.

Sealing shall be signing (*a*); Delivery as a Deed, shall be Publication of a Will (*b*); the Witnesses may attest at different Times (*c*); the Presence of the Testator shall not be confined to the very Room (*d*).

It is beyond the Power of Penmanship to anticipate such Questions; and it must always be remembered, that the Rules of Construction were framed to supply the Defects of human Language and Capacity. Nor do I think it would dishonour my Lord *Hales's* Character to be reputed the Author of this Clause, (which, by the by, he might have been, though he

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died

(*a*) 2 *Stra.* 764.

(*b*) 8 *Vin. Abr.* 125. pl. 13.

(*c*) 2 *Chanc. Caf.* 109.

(*d*) 2 *Salk.* 688. *Carth.* 81. 12 *Mod.* 37. 3 *Salk.* 395. pl. 1. *Comb.* 158.

died before the Statute passed;) for I cannot help subscribing to the Opinion of a great Judge, who said that these Decisions were rather a Reproach to the Profession, than to the Clause.

If the Law is then vindicated from this Charge, and if it is, as the Legislature has called it in the very last (*a*) Act, an excellent Law, the Judges ought to take the utmost Care not to weaken the Force of it, by a mistaken Favour to Wills, remembering always, that the Legislature meant to prevent Fraud, and not to multiply Wills; much less ought they to treat the Objection to the Legatee Witness with Slight, by calling it Form, when the Legislature, even in their last (*b*) Act, have unwitnessed the Legatee *as such* by annulling his Legacy.

This last Act has, in Effect considered the Legatee as totally *incompetent*. This last Act has, in effect, pronounced that the Testator cannot be safe under such Witnesses. This last Act, though it has varied the Method, has done the same Thing, and worked upon the same Principle; and both Acts, by different Ways, arrive at the same End. The one disables the Legatee from being a Witness. The other disables the Witness from being a Legatee. Where is the Difference? Both concur in saying the same Person shall not be a Witness and a Legatee.

I come now to the great leading Case upon this Point, *viz.* that of *Hilliard, v. Jennings*, which I conceive to be a direct Authority to shew, that *competent* and *credible* Witnesses are the

(*a*) The Words of the Legislature are "which (*viz.* Stat. 29 Car. 2. c. 3. *sect.* 5.) hath been found to be a wife and good Provision." Preamble to Stat. 25 Geo. 2. c. 6.

(*b*) 25 Geo. 2. c. 6.

the same, and that the true Reason of requiring three *credible* Witnesses, was to protect the Testator from Fraud.

The Argument, on the other Side, has taken the Report of this Case from *Carthew*, deeming him the best Reporter, because he was Council in the Cause; and has not reported the general Principle upon which that Case was ruled, has taken it for granted, that it was ruled upon no general Principle, though the other Reporters have freely stated the Argument at large, together with the Grounds of that Resolution; this makes it necessary to examine *Carthew's* Report with more Attention; and, if I am not mistaken, he will appear to be the worst Reporter of them all; though at the same Time, they will be found to correspond and be perfectly consistent when they are compared together.

The Words of *Carthew's* Reports are;

“ This Will was void *quoad* the Devise of the Lands to the Plaintiff, *because he being the Person to whom the Lands were devised, cannot by Law be allowed to be a credible Witness to prove the Execution of the Will on his own Behalf;* wherefore, *with respect to this Devise, the Will was attested only by two Witnesses, which is not sufficient to answer the (a) Statute.*”

In order the better to understand this Book, give me leave to state the Case, and draw the Argument of the Court upon the Point into a Syllogism.

The Case stated is no more than this.

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The Statute requires three *credible* Witnesses to attest, and the Devisee of the Lands is one of those three Witnesses.

The Argument upon which the Opinion of the Court was founded, may be thus drawn into a Syllogism.

The general Principle, or the Major of the Syllogism.

No Person who would be *incompetent* to prove a Will upon a Trial, can be *credible* to attest it upon the Execution.

This Major is proved by other Arguments, which I will not repeat, shewing that the Statute would be evaded by any other Construction.

The Minor.

The Devisee, in this Case, would be *incompetent* to prove.

Ergo, he is *not credible* to attest.

Every Body knows that the Minor of a Syllogism is derived out of the Major, which is a general Proposition, either self-evident, admitted, or proved by the Arguments, and that an Argument cannot be perfect without the Major.

Now Mr. Serjeant *Cartbaw* has reported only the Minor, and the Conclusion, and has totally omitted the major Proposition.

The two last Members of the Syllogism in that Book are thus expressed.

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The Plaintiff cannot by Law be a *credible* Witness to prove the Will in his own Behalf.

Ergo, the Will is void *quoad* this Devise.

Thus he informs you, that the Witnesses' *Credibility*, in *this Case*, is determined by the Consideration of his *Competency* at Law.

But why that *Competency* at Law comes to be the Criterion of his *Credibility* under the Statute, the Book explains not, but leaves that Principle, which is the Major of the Syllogism, to be collected by the Reader.

This is one Defect in the Report; but there is another, which is still more misleading, and that is, that he has narrowed his Conclusion to the very Case before him, by saying the Will is void *quoad this Devise, and with respect to this Devise*; by which emphatical Manner of confining his Conclusion, he seems to intimate, that the Will might be good as to every other Devise. Whereas, if he had stated the general Proposition from whence this Consequence was deduced, his Report could not possibly have been mistaken.

True it is, that when the Will comes to be looked into, you see the true Reason why he has laid so much Stress upon this specific Devise, not because he meant to distinguish a Devise to the Witness, from any other *real* Devise in that or any other Will, but because all the rest of the Will related to the *personal* Estate, and this was the only *real* Devise, he reports the Will void in this Part, only in Opposition to the *personal* Part wherein the Will was good.

Now

Now let us see the Use that has been made of this Report, by the Argument on the other Side.

By omitting the general Principle upon which that Case was determined, it has formed that particular Decision into a general Rule, by which the general Principle is contracted to that particular Case: the Rule is this.

That no Witness by his own Subscription shall take an Interest after the Statute, which he could not prove at that Time by his own Examination.

I do admit this Proposition to be true as far as it goes, and to be so resolved by the Court. But I say the Court went further, and resolved that no such interested Witness could establish any Part of the Will, but that the whole Will, would be void *in toto*, as well as his own particular Bequest; so that when it is pretended, that the Court confined the Resolution to the particular Case before them, and meant to extend their Doctrine no further, I do, with Deference, deny this Inference, and will prove the contrary from the Case itself as reported by the several Authors, and Mr. Serjeant *Carthew* shall not be omitted.

The best Way to understand the Grounds of the Resolution is to state the Arguments on both Sides.

Serjeant *Carthew's* own Argument in Favour of the Will.

“ 1st. The Plaintiff is a Man of an indisputable Credit.

“ 2d. Though he cannot be sworn upon a Trial, yet one cannot say but that there were three Witnesses to the Will; and the Will has been well proved by the other two Witnesses.

3d. There

3d. There is a Difference between a Matter which goes to the Credit of his Testimony, and a Matter which goes in Bar of it. The first Sort are excluded from being Witnesses by that Statute; as a Man attainted of Treason, &c. But where there is only a Thing which bars him from being a Witness, but does not touch his Credit, it is otherwise.

4th. The Intent of the Act was, to prevent Perjuries; but this cannot be within the Mischief of the Statute, because the Devisee being a Witness, could not be sworn and examined upon it, and therefore out of the Mischief of the Statute.

5th. That this Statute has been taken with a liberal (a) Construction."

The same Argument thus reported by Lord Chief Baron (b) *Comyn*.

"Although the Plaintiff cannot be examined as a Witness in his own Cause, yet the Will being proved by other Witnesses, he is a credible Witness to the Will, although not in this Cause; and there is a Diversity between a Person who is infamous and incapable to be a Witness at all, and such an one who may be a Witness, but in a particular Case is not allowed to be examined in respect of his Interest."

Now take the Argument on the other Side, and the Resolution of the Court.

1st. "Against this it was argued by Mr. Pratt, and held by the whole Court, that this Will was not well executed accord-

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(a) Lord Raym. 506, 507. (b) Com. Rep. 91.

ing to the Statute of Frauds. For a Man *who cannot be a Witness, which is the Plaintiff's Case, cannot be a credible (a) Witness.* And the Intent of the Act was to prevent Frauds as well as Perjuries; which Intent would be evaded, if the Devisee should be admitted to be a Witness, who being a Party interested, might probably be induced to use Fraud. And Mr. *Pratt* said, that the Statute appointed three Witnesses, &c. to the End that it might be done in such a solemn and notorious a Manner, that they might see that the Devisor did not suffer any Imposition, being infirm as well in Understanding as in Body, as all Men generally *in Extremis* are. But if Persons, who cannot give Evidence of their Subscriptions, &c. shall be admitted to be credible Witnesses, it is to admit so many dead Letters to be Witnesses, which intirely evades the Intention of the Act.

And for this Point the whole Court were of Opinion, to give Judgment for the *(b)* Defendant."

"As to the other Point, Serjeant *Pratt* argued, and it was *held by the Court* that the Will was not well executed, for the Plaintiff was not a credible Witness, as he himself was to take by the Will; for the Intent of the Statute was to prevent any Practice by Persons interested *in the obtaining of a Will*; and if he who is to take by a Will may be a good Witness, it will be an Encouragement to such *(c)* Practice."

To these I will add a third, which my Brother *Gould* has favoured me with, taken by his Father, one of the Judges who determined that Case.

"By Direction out of the Court of *Chancery*, the Question was, Whether a Devise of *Enskall Farm* by *Thomas Jennings*

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(a) *Freem.* 510. 12 Mod. 277.

(b) *Lord Raym.* 507.

(c) *Com. Rep.* 95.

to William Hilliard and his Heirs be a good Devise, he being one of the subscribing Witnesses?"

Objection: A good Devise so long as three subscribe and witness it; for 'tis *credible* which is in Opposition to a Person attainted; but if two of the Witnesses were dead, then indeed it might be bad.

But resolved for Plaintiff by the whole Court clearly, that he not being *credible* to prove the Will, the Devise is a void Devise. For the Design was to set up a *credible* swearing Witness and this to prevent Fraud and Perjury."

Several material Observations arise from the Case thus reported.

1st. They do all agree with *Cartbew*; the only Difference between the Books being this, that the latter report the Resolution without the Reasons, the others report the Reasons as well as the Resolution.

2d. The Court took it to be a Case of Construction upon the Statute, and Nothing else.

3d. They considered the *Credibility*, as well as the *Attestation*, to be the very Substance and Essence of the Business.

4th. They ruled *credible* to be the same as *competent*.

5th. They not only held this necessary to prevent Fraud, but held likewise, that if they gave *credible* any other Sense the Statute would be evaded.

And therefore, the Rule of Construction laid down by the Court was general, to annul all Wills, and all real Devises whatsoever, where one of the Witnesses was incompetent.

I have done with the first Point, and have proved, as I hope, both by Argument and Authority, that Proposition which I undertook to maintain. *Viz.* That the *Credibility* of the Statute meant *Competency*, and that this was a necessary and substantial Qualification in the Witnesses *at the Time of Attestation*. Which brings me to the next Consideration, Whether the Witnesses to this Will come within that Description? Being now in Possession of the true Criterion of Credibility, which is no other than Competency, this is a mere common Law Question, and therefore I shall produce the Witnesses in Court, and take the Objection to them before they are sworn.

The Case is this.

The Testator devises certain Lands to Trustees, to be applied to the Use of such Poor as by Reason of Infancy, Impotence, or old Age, are unable to work, and to place out the Children of such Poor, Apprentices; and declares, that the Rents shall be applied to no other Use or Purpose.

Three Witnesses who attested the Will, are seised of Lands in Fee within the said Parish at the Time of Attestation.

The Objection is, that these Witnesses cannot be admitted to prove the Will in Court, while they remain so seised, because by the Establishment of the Will they will derive an Interest to themselves in respect of those Lands.

Their

Their Interest is this, that as the Poor's Rate must be reduced in Proportion to the Value of this Benefaction, their Estates will become Rate free *pro tanto* for ever. And although the Devise at the Time of the Testator's Death was future, and did not take Effect 'till 1746, twelve Years after, yet it was a present Benefit to the Owner of those Lands, and made them immediately more valuable, in Consideration of this future Easement.

I have many Arguments here to encounter, both from Bar and Bench ; I shall endeavour to answer all to the best of my Power, and with all that Respect which their Opinions always deserve where we differ.

First it was said, that the Poor here described must be understood to be a Class of Poor just above the Necessity of Relief, and that this Charity may be applied by the Trustees to the Use of such Persons exclusive of the Parish Poor. To which I answer, that the Poor in this Will are those who labour under the extreamest Wretchedness of helpless Poverty. For when it is considered that the Day Labourer, who only lives from Hand to Mouth, is deemed by the Testator to be a Person above the Want of this Charity, which is confined to the Impotent only, those who have enough to subsist on without Labour must, *a fortiori*, be excluded.

2d. The Poor in this Will are denoted by the same Description as the parochial Poor are by the 43 *Eliz. c. 2.* And if this be so, this Charity cannot, by the Terms of it, be distributed to a set of Men who are excluded by the Will ; it will be a Breach of Trust to do it, and if it be said that the Court of *Chancery* can direct the Money to be applied to a superior

perior Order of Poor, I desire a Case to be produced where that Court has ever made such a Decree. If a Legacy had been given to poor House-keepers, and Poor not receiving Alms, or to Poor in general, there might perhaps be some Ground for that Distinction. But I can never believe, that the Court could make such a Decree in this Case, the Business of that Court being to *expound* Wills and *not to make* them.

And whereas it is said, that these Legacies, when they reduce the Rate, come to be, in their Operation, Legacies to the Rich, and not to the Poor. I answer, that it is impossible to be otherwise; and though this is always to be supposed to be contrary to the Testator's Intention, no Man living can be sure of that, and I do much doubt it; for why may not a Man mean at the same Time to give to the Poor, and likewise ease the Parish; the Poor's Rate is a most heavy Burden, it falls upon the Tenant and Occupier, and is paid by those who are not above a Degree or two richer than the Object he is forced to relieve; so that he who so disposes of his Estate is a double Benefactor. But be this as it will; if a Gift is made to the parochial Poor, it must reduce the Rate *ex Necessitate*, though the Testator may possibly intend otherwise.

My Brother *Gould* contends in the next Place, with whom my two Brothers now concur, That this Benefaction should not be considered as an Ease to the Parish, but as a Bounty to be added to the Parish Relief, for the Comfort of the Poor, and not for their Subsistence.

By the 43 *Eliz. c. 2.* the Parish are only taxable for the *necessary* Relief of the Poor; Nothing therefore but *Necessity*
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can call for this Relief; if the Party can subsist by any Means whatsoever without this Aid, he is not the Object of this Law; nor can it ever be material to consider from whence the *Pauper* is supplied, if he has wherewithal to subsist without the Parish, the Parish must be discharged because the Relief in such a Case is not *necessary*.

And as the *Necessity* of the Object is the Rule by which the Relief is to be apportioned, it must be more or less according to the *Pauper's* Condition and Circumstances.

If a Labourer who gets seven Shillings a Week by his Industry, is incumbered with a large impotent Family, the Parish adds so much to his weekly Gain, and no more, than will be just enough to keep the Family alive; if he falls sick, the Allowance is increased; if his Children die, or become useful, it is diminished. One has a little Cloze worth forty Shillings a Year, his Stipend will be less than his Neighbour's who has but twenty Shillings a year, and his again will be less than another's who has Nothing.

This is the true Reason why the Rate is directed to be made *weekly* or otherwise, because the State of the Poor is always fluctuating.

An Estate or a Legacy is given to the Poor. If in this Case the Rate must continue the same without any Regard to this Benefaction, you call upon the Parish for a Superfluity, for as far as the Rate added to the Charity will exceed the Sum *necessary* for their Subsistence, the Parish is taxed just so far beyond the Sum *necessary* for their Relief, and so contrary to the Act of Parliament; for Relief and Subsistence are synonymous Terms.

This

This Duty upon the Parish is so connected with the *Necessity* of the *Pauper*, that if a Testator, bequeathing a Legacy to the Poor, should say, "I mean that the Poor should enjoy the same Parish Allowance over and above my Legacy," the Clause would be *felo de se* and void, unless it can be maintained that he who has Something is as poor as he who has Nothing; for if he is richer he wants less Relief, and if less Relief, a lower Rate will do. So that if the Legacy takes Place, the Parish must of Necessity be eased.

I have been arguing upon an Allowance of Money. Suppose a Testator bequeaths a Legacy to cloath the Poor, or an House to receive them, or a Sum of Money to apprentice out Children. Must the Parish still cloath, lodge, and bind out as they did before? Or, must they add the Value of the Cloathing, House, &c. to the former Allowance, and so give the poor a Superfluity above their *necessary* Subsistence? I think that cannot be contended for, and yet a Gift of an House or Cloathing is as much a Bounty to this Purpose as a Gift of Money.

If I suppose in arguing, which I have a Right to do, that the Charity is ample and sufficient to maintain all the Poor, my Brother *Gould* does not even choose to deny that the Parish in this Case must be eased; but if it is only a Trifle it is a Bounty.

According to what I have said, let it be ever so small, it must operate *pro tanto*. But if I should for a Moment admit a Distinction, will he be pleased to draw the Line? If he can do that, I may venture to promise that I will come over to his Opinion; if he cannot, I think he ought to come over to mine.

Nor

Nor can there be any Difference between a Devise to Trustees and a Devise to Overseers; the Trust is the same in both, and the Objects the same; and the parish Officers are but Trustees, as the Trustees, in the Application of the Charity, are parish Officers; the Hands through which the Charity passeth are in both Cases mere Instruments.

Neither is there one Case to support my Brother's Notion, but all the Authorities seem the other Way; for as often as this Question has come before the Court in the Cases of Penalties given by Parliament to the Poor of the Parish, the Court has constantly held that the Rate would be reduced by those Sums, and every Parishioner eased *pro tanto*.

Yet these are Gifts, why not Bounties in many Cases more inconsiderate than the present. Upon the whole, this Idea of a Bounty is novel at the Bench, and of the first Impression; and when I was prepared to argue the Case of *Portman, v. Otreden* upon this Ground, the Court of *King's Bench* would not hear me.

Where Charity was given for the cloathing six poor Persons of the Parish of *E.* Lord Chancellor *Macclesfield* would not suffer any of the Inhabitants of *E.* to be Witnesses, because they were interested, as being eased in the Poor (*a*) Rates.

Lastly what can be said upon the last Use in this Will, to bind out poor Children Apprentices, there the Parish must be eased, unless they will choose to pay the Master double the Value.

To proceed now to the remaining Difficulties.

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(a) *Wil. Rep.* 600.

The Interest is Nothing claimed under the Will, it is Nothing in present, it is contingent in future, it is minute.

To the first; it is not given to the Parishioners, but it is an Interest derived to the Parishioners in Consequence of the Will, the common Case of Penalties given to the Poor, they gain if the Will is established, they loose if it is set aside.

To the next; it is no Easement in present I do admit, but in Respect of future Easement it is even now a present and a lasting Benefit, and in Truth (which will answer the next Objection at the same Time), all future Interests, whether certain or contingent, whether now or hereafter to be enjoyed, are present Benefits, have a Price and are saleable.

The Court of *Chancery* therefore have very sensibly pronounced Possibilities to be vested Interests, and made them transmissible: A Fee expectant upon a thousand Years Term has been sold for Money. Let me put the Case of an executory Devise of an Estate of 10,000*l.* a Year, and the Life before it in a deep Consumption, I am intitled to put the strongest Case I please, could this Devisee be a *competent* Witness to prove the Will? The Answer must be, he could not: Tell me then what Chances are valuable and what not! Till this Life is drawn I must insist that all Chances are valuable.

Hence if it should be said that perhaps the Parish may have no Poor; I admit the Supposition to be possible and barely so; but if it be only as possible that they may be burthened with Poor, every Estate that is discharged from this possible Burthen is in that Respect bettered, and must remain so as long as the Statute of 43 *Eliz. c. 2.* stands unrepealed.

As to the Objection that the Interest is minute, and that a small Interest, as in *Townsend's Case*, ought not to disqualify Witnesses.

I do conceive that however that Point might have been litigated formerly, yet now the Law is clearly settled, and the Witness must be rejected, if he has any Interest, be it ever so small.

The Point was disputed for above twenty Years, in the Case of Toll or Custom claimed by the City of *London*, upon Importation, called by the Name of Water Bailage.

The Question was, whether Freeman might be Witnesses? Nothing can be more minute than such an Interest; and yet after many Opinions, *pro* and *con* it was finally settled that they were not Witnesses.

Any Person who has a Mind to trace the History of this Question may find it in 2 *Keb. Rep.* 295. pl. 84. 2 *Show. Rep.* 47. pl. 33. *id.* 146. pl. 127. 2 *Lev.* 231. *Ventr.* 351.

This last Case, and it is the last I can find upon the Subject, 32 *Car.* 2. is differently reported in the two Books, for one (a) states that three (b) Judges allowed the Witnesses and (c) one dissented, upon which the Council for Defendants tendered a Bill of Exceptions, but the Plaintiff gave it up and called other Witnesses.

The other (d) Book says, that the Freeman were denied to be Witnesses, and that the Plaintiff tendered the Bill.

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(a) *Ventr.* 351.

(b) *Viz.* *Scroggs* Chief Justice; *Dolben* and *Raymond*, Justices. *Ventr.* 351.

(c) *Sir Thomas Jones*.

(d) 2 *Show. Rep.* 48, 146, pl. 127.

I cannot reconcile the Books, but both agree the Witnesses were not examined, and the Verdict went for Defendants.

What became of the Bill of Exceptions does not appear, I should guess it was argued and settled solemnly, That the Freemen could not be Witnesses, because it is so said by a Lord Keeper and a Lord Chancellor in *Vernon*.

1st. Lord Keeper *North*, in 1684, two Years after this Trial, said "he thought it very hard in the Case of the *Waterbailage* of *London*, that no one Freeman of the City, though it was not Six-pence Concern to him, could be admitted as a (a) Witness."

In 1694, Lord Chancellor *Somers* said, "In Suit touching the Loss and Misapplication of a Sum of Money given for the Benefit of the Parishioners, none of the Inhabitants ought to be Witnesses; for in a Case, where a Party is concerned in Interest, though never so small, the Objection has always prevailed; and it was so resolved upon great Debate in the Case of the City of *London*, concerning the (b) *Water-bailiff*."

"Upon Issue joined upon a Prescription for a Toll, the Defendants produced a Witness; the Plaintiff objected, that he was a Freeman and so interested; upon which the Defendants produce a Judgment in the Mayor's Court, where upon a *Scire facias* awarded, and two *Nibils* returned, they had given Judgment of his Disfranchisement: But upon Inquiry, the Man said, he never was summoned, and knew Nothing of his Disfranchisement; therefore, the Proceeding being irregular, *Holt* would not admit the Man to be an Evidence, because the Judgment in the Mayor's Court may be (c) avoided."

The

(a) *Vern.* 254. pl. 246.

(b) *Id.* 317. pl. 318.

(c) 11 *Mod.* 225. pl. 20.

The Statute of 3 & 4 *W. & M. c. 11. Sect. 13.* is material for this Purpose; for, by that Act of Parliament, " In all Actions brought in the Courts at *Westminster*, or at the Assizes, for any Money mispent, or taken by Church-wardens or Overseers of the Poor, the Evidence of the Parishioners, other than of such as receive Alms or any Pension out of such Collections or public Monies, shall be admitted."

So again by Stat. 1 *An. St. 1. c. 18. Sect. 13.* " In all Informations or Indictments, the Evidence of the Inhabitants of the Town or County in which decayed Bridges or Highways lie, shall be admitted."

Which Acts shew that the Rule to reject the Witnesses for minute Interest could not be broke in upon by less Authority than an Act of Parliament.

There is a Case in (a) *Viner* where it is said, that " In Information by Attorney General, at the Relation, &c. on Behalf of themselves and all Inhabitants of the Town of *Warwicke*, &c. relating to Charities, &c. a Person an Inhabitant receiving Alms is no Witness; for every Inhabitant either pays or is under a Possibility of paying to the Church, Poor, &c. though he pays Nothing at present."

If the Rule be so, it must prevail as an Objection to all Witnesses without Exception, and there can be no Difference between Witnesses to a Will, and any other; I say this, because I see a Practice had prevailed to admit Will-witnesses where the Legacy was small.

In

(a) 12 *Vin. Abr.* 18. pl. 19.

In the Argument of the *Water Bailage Case*, it is said, that "a small Legatee has been sworn to prove a (a) Will," and that it had been (b) usual.

And Lord *North* is made to say, "it was usual where a Man was a Legatee, if it was an inconsiderable Legacy, as five Shillings (or five Pounds to a Man of Quality,) that he should nevertheless be a Witness to prove the (c) Will."

It is plain there had been such a Practice, and I take it to be upon that Ground that the Parishioner was allowed to be a Witness in *Townsend's Case*; but that Practice ceased, I believe upon the Statute of Frauds.

But I take it most clearly, that this Notion is now exploded, and therefore if it shall be once admitted, that the Parishioner in *Townsend's Case* had an Interest under the Will, the Case neither is nor can be Law, 'till it can be proved that a Legatee of a small Sum may at this Day be a Witness.

True it is, that the Interest of the Witnesses in some Cases, is drawn so fine, that it is scarce perceptible; and yet that Glimmering, that *Scintilla*, shall be as powerful to exclude the Witness, as the most substantial Profit; and I have always understood that (d) Case to be good Law, where the Court set aside the Witness, because he thought himself bound in Honour to pay the Costs of the Suit.

The true Ground whereof is this, which is fit to be attended to in every Part of this Branch of the Argument; that as no
positive

(a) *Ventr.* 351.

(b) Sir *Bartholomew Shower* (who reports same Case, by the Name of *The King against Carpenter*,) his Words are "hath sometimes been allowed a Witness to prove a Will." *Shower*, Rep. 47. pl. 33.

(c) *Fern.* 254.

(d) It is reported in *Sira.* 129.

positive Law is able to define the Quantity of Interest that shall have no Influence upon the Minds of Men, it is better to leave the Rule inflexible than permit it to be bent by the Discretion of the Judge.

THE DISCRETION OF A JUDGE IS THE LAW OF TYRANTS; IT IS ALWAYS UNKNOWN; IT IS DIFFERENT IN DIFFERENT MEN; IT IS CASUAL, AND DEPENDS UPON CONSTITUTION, TEMPER, AND PASSION. IN THE BEST IT IS OFTENTIMES CAPRICE, IN THE WORST IT IS EVERY VICE, FOLLY, AND PASSION TO WHICH HUMAN NATURE IS LIABLE.

I have done with this Part of the Case, and return again to the Statute of Frauds, and the next Point, which is, Whether a Witness not *credible at the Time* can become so by Matter *ex post Facto*, so as to re-establish the Will?

If my Construction is right, the Will upon the Attestation is *ipso Facto* void by the very Words of the Statute.

The Testator has been betrayed, the Fraud is committed, and you may as soon recal Time as make that Transaction honest which was originally fraudulent; no Purgation can cleanse the Witness.

I say if I have construed the Statute right, every such Attestation is a conclusive Mark of Fraud upon the Will, against which no Evidence can be given; and though it has been said, that a Legacy is no present Interest, and that the Legatee does not know the Contents of the Will; I answer, that if it shall be once held, that such a Will may be established by the Legatee's Release, every Legatee who intends a Fraud will always for the future be sure of the Contents before he attests.

But

But still it is argued, that if you pay or release the Legatee he is a good Witness, his Bias is gone, the Will shall be established.

It is difficult to say, whether this Doctrine is more pregnant with Mischief or Absurdity.

1st. It furnishes the Will-maker with Bribes to the Witnesses out of the Testator's own Estate to deceive himself and disinherit his Heir; nor is it possible to give the Witness a stronger Security for his Legacy, than by making him a Witness, because by this Means his Release being necessary, he gains a Power over the whole Will. Thus the Law co-operates with the Fraud, in requiring the Devisee to pay the Witness his Hire before, under the Penalty of setting the Will aside if he refuses.

But the Mischief will not stop here, the Legatee will naturally proportion his Demand to the Value of the Estate bequeathed, and will frequently exact more than his Legacy.

Nay, he will think it worth his while to hold himself out to the Heir, and keep the Will in Suspense 'till the one or the other is brought up to his Price; and thus the Testator's Land, after his Death, will be sold by the Witness to the highest Bidder.

To Day the Will is bad, for the Legatee will not release; To Morrow the Legatee is satisfied and the Will is good: The Heir at Law recovers in one Term, and he is disinherited in the next.

In this State of Uncertainty the Will must remain, 'till the Legatee is pleased to pronounce it's Fate.

But

But suppose the Witness should die before he has released; nay, put the Case that he dies before the Testator, is the Will good or bad? If good, he is a credible Witness, and needs no Purgation. If bad, he is not credible, and incapable of it.

Again, let us suppose the Witness convicted of some infamous Crime, can the Crown restore the Will by a Pardon? In that Case it depends upon a Casualty, and the King disposes of the Estate.

Among all these Difficulties one might have expected some Rule would have been laid down to fix a certain Period for the establishing or annulling of the Will, by telling us how long the Incompetency of the Witness was to vitiate the Instrument; for it is impossible to conceive it could remain in this State of Fluctuation for ever.

I have endeavoured to find out this Point of Time from the Argument on the other Side, without Success. It is said indeed, that the Time of Examination could not possibly be the Criterion on which the Will was to depend, because the Witnesses might not live to be examined, and their Incompetency might arise long after their Signing, I do most clearly conceive, that this cannot be the Criterion. The only fixed Period remaining is the Time of Attestation; but the whole Argument on the other Side is brought to prove, that that Point of Time cannot be the Criterion; so that both these Periods being excluded, it doth behove the Council for the Defendant to point out some other; but the Argument is silent, and the Will is left at last, after so much Pains, to float upon that Sea of Casualties I have been describing.

The common received Usage with the Opinion of eminent Practitioners has been called in Aid, and they have been named; Mr. *Fazakerley*, and Sir *Thomas Bootle*. They are great Names, and I have an high Regard to their Opinions. The general Practice too of the Hall is always a weighty Argument, and should never be slighted. I don't find that this Practice, as it is called, ever went beyond the Cases of Money-Legacies, which sprung up, as I guess, from the Practice in the spiritual Court, where a Release to this Day will make the Witness. But it is not pretended that this Practice ever prevailed so far as to admit a Release or Payment to restore the Witness where he was a *real* Devisee, so far from it, that *Hilliard, v. Jennings* passed always for Law without a Murmur, and it was not 'till after the true Principle of the Statute of Frauds came to be thoroughly discussed and settled in the Case of *Anstey* and *Dowling* that those Practitioners came to be alarmed; then indeed their Eyes were opened, and they begun to fear, that if the Court of *King's Bench* was right, the Practice and their Opinions were erroneous; but as the Principle was stubborn and would not yield to any Exception, the Legislature very properly took it in Hand, and has, with great Wisdom, cured the Evil without weakening the Statute of Frauds, which no Court of Justice was able to do.

But if these Points fail, the Defendant's Council resort to another, which will at once solve all Difficulties, and that is, that the Witness, notwithstanding the Objection, may still remain a good Witness to every other Devise but his own.

If this can be done, it will be a Method of setting up the Will by annulling the Legacy; for a Legacy that cannot be proved, is the same as no Legacy at all, it is a Nullity, it does

not

not exist : *de non apparentibus & de non existentibus eadem est Lex & Ratio.*

This I do admit will solve all Difficulties at once, and will render the Legatee as safe and disinterested a Witness as if he had no Legacy.

And if this had been Law, it would have saved the Legislature the Trouble of a new Act; for it is the very Method which the Parliament has now taken, who by making the Devise void in this Case, has disabled the Witness from being a Devisee; and this has effectually cured every Difficulty, and removed every Mischief.

It remains then to be considered, whether the Attestation of a Legatee before the Act of 25 G. 2. c. 6. made his Legacy absolutely void, for I must insist upon it, that he can never be a *credible* Witness to any Part upon any other Ground than the original Nullity of his own Legacy; if the Legacy is not void, then his Interest attaches at the very Instant of the Attestation and vitiates the whole Will for ever, unless the Fact can be purged afterwards by Release.

Now that the Gift or Legacy is void, I do beg leave, with great Difference to other Opinions, to deny.

In all those Cases, if I am not mistaken, the only Reason why the Witness is rejected is because his Legacy is good.

Consider the Case of a Will before the Statute; if attested by the Legatee not void in its Creation, it was only held back from operating for Defect of Proof, and therefore the Moment the Proof was opened, either by Payment or Release, or if the Will could have been proved by other Witnesses, though the

Devisee was one, the Will came forth a valid Instrument to all Intents and Purposes.

Thus if the Common Law Rule could be adapted to the Construction of this Statute, it would not make the Devise void, but get rid of it by Payment, allowing it to be good. And indeed this Analogy did prevail so strongly, that it grew to be a common Opinion, that where a Legacy only was given to a Witness, though charged upon the Land, a Release would do the Business.

Again: That the Legacy was not void by the Attestation, is further proved by the last (a) Act of Parliament, which does not confirm any former Will liable to the Objection 'till the Legacy is either paid or tendered. Whereas, the same Act declares, that in all such Wills for the future, the Legacy shall be void.

It is from hence observable, that though the Legislature avoided giving any Opinion upon this litigated Question upon the Statute of Frauds, yet they declare in the strongest Manner, that the Legacies so given to the Witnesses were not void, and that it required a new Law to make them void for the future.

Let me add to this the common Opinion of the Bar so much relied upon in the former Part of the Argument, that the Legacy was so effectual to disable the Witness, that Nothing less than a Release would enable him to prove the Will for any Body's Benefit.

I wonder a little why so much Pains are taken in this Argument to establish the Practice of releasing, if the Legacy was a Nullity, and wanted no Release; for if this last was Law, that

(a) 25 G. 2. c. 6.

that Method was not only nugatory but unjust, and the Parliament must be charged with the same Injustice in directing so many void Legacies to be paid. But if I have expounded the Statute right, where a Devisee is a Witness, the whole Will is fraudulent *ab Initio*, and it cannot be otherwise.

The Publication is one intire Transaction, the Will is one Disposition of the Testator's Estate to several Persons, the Bequests are settled and apportioned by a Comparison with each other, and if you garble the Will by taking out particular Bequests you vary the Testator's Intention in the Remainder, and his whole Will is maimed.

In Case of Fraud, for the Argument must always remember, that these were the Cases which the Statute intended to prevent; the Witness gets his Legacy by the Merit of attesting the other Bequests (for the grand Devisee will hardly ever be a Witness) and it is by the other Part of the Will that the Heir is generally undone, so that the Remainder of the Will which the Legatee is to establish is ten times worse than that Part which is to be annulled.

Let us now see how this Point stands upon the Cases.

Hilliard, v. Jennings said to be an Authority, and so proved in *Baugh, (a) v. Holloway*. This requires some Examination: In *Baugh, v. Holloway* Sir Robert Raymond *arguendo* does say very confidently, if that Reporter is not mistaken, that Lord Chief Justice Holt had declared this Opinion in *Hilliard, v. Jennings*. And there is an Expression in Carthew's Report of that Case, that seems in some Sort to favour the Doctrine.

I have, in the former Part of my Argument examined that Case so fully, that it will be sufficient here to observe,
that

(a) *Will. Rep.* 557, 558.

that this Point was neither resolved, nor argued, nor hinted at in *Hilliard, v. Jennings*; and it was impossible that the Point could arise upon that Will, which contained only one single Bequest of real Estate.

If that be so, as it is, it would have been a most extraordinary Thing, if the Court had spontaneously taken upon themselves to settle this important Point tending to no less Consequence than a virtual Repeal of the Statute of Frauds; it would have been strange, I say, to have done this without a Case or a Reason to support it, when the Point too was collateral to the Question before them, and neither touched by their Council nor argued by themselves.

I don't wonder Sir *Robert Raymond* should argue, as it is pretended, for his Fee, the Bar is apt to argue in that Manner, nor do I wonder the Court should in so stale a Business send the Plaintiff to Law. But I can by no Means conclude that because the Case never came back, that the Heir at Law gave up the Point, why might it not end by Compromise? I could make twenty Conjectures that should all account for the Discontinuance of the Cause more probably than that, but it is not worth while, because if the Heir at Law had really given up the Point, his Concession would not weigh an Hair in the Argument.

I have now gone through the Argument, and will close with declaring that I will take no Notice of any Part of the Civil Law Learning that has been brought into this Argument; Lord Chief Justice *Lee* did not ground his Opinion upon that Law, he did not argue from it, he did not rely upon it's Authority; I am favoured with a very correct Note of his Opinion from my Brother *Adams*, where, after he had fully argued the Case, without taking any other Notice of the
Civil

Civil Law, than to declare that *Swinburn's* Law upon Legacies cannot be applied to Land Devises, and to observe in the same Place, that both Laws concur in rejecting interested Witnesses;

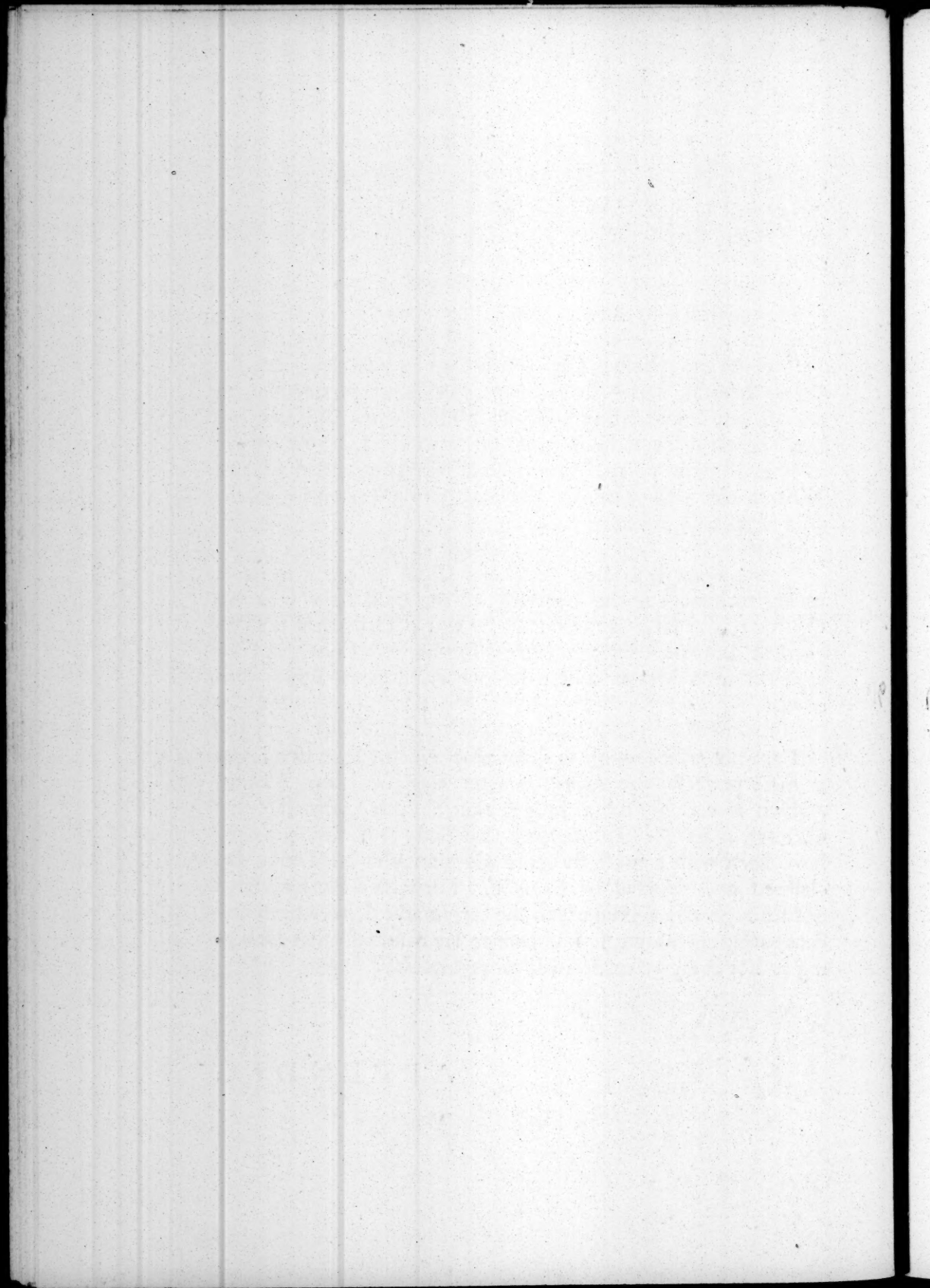
He concludes in these Words.

“ Upon the whole ; *Conditionem Testium cum signarent, inspicere debemus*, and as that is to be considered as intended to prevent any Fraud being used at a Time when Testators are most of all liable to be imposed on, and as all People have it in their Power to get disinterested Witnesses, we think this Will is not well executed according to the Statute ; but is void as far as it concerns Lands.”

This is enough to shew that Lord Chief Justice *Lee* never meant to introduce the Learning of the Civil Law into this Question, the Rule is mentioned by way of Ornament not Argument, because it happened to express his own Common Law Opinion in a Matter where he conceived both Laws concurred.

I am not wise enough to determine which of the two Laws is most perfect, the *Roman* or the *English*. *This I know*, (which is enough for a Judge) that although almost every Country in *Europe* hath received that Body of Laws, yet they have been with a most stubborn Constancy at all Times disclaimed and rejected by *England*. For which Reason, (and not through any Disrespect to the Argument I have been endeavouring to answer) I choose to lay a-side all that Learning as not being relevant in *Westminster-Hall*.

APPENDIX.



A P P E N D I X.

*As the Statute of 25 Geo. 2. c. 6. (intituled "An Act for
" avoiding and putting an End to certain Doubts and Quef-
" tions relating to the Attestation of Wills and Codicils
" concerning real Estates in that Part of Great Britain
" called England, and in His Majesty's Colonies and Plan-
" tations in America.") hath been so often mentioned in
Lord Camden's Argument, it was thought proper to subjoin
an Abstract of it.*

" **I**F any Person attest the Execution of any Will or Co-
dicil, made after the 24th June, 1752, to whom
any beneficial Devise, Legacy, Estate, Interest, Gift or Ap-
pointment of, or affecting any real or personal Estate, (ex-
cept Charges on Lands or Hereditaments for Payment of
Debts,) is thereby given or made, such Devise, &c. shall so
far only as concerns such Person attesting such Will or Codicil,
or any Person claiming under him, be void ; and such Person
shall be admitted as a Witness to the Execution of such Will
or Codicil, within the Intent of 29 Car. 2. cap. 3. sect. (1) 5."
Stat. 25 Geo. 2. c. 6. sect. 1.

" In Case by any Will or Codicil already made or hereafter
to be made, any Lands or Hereditaments be charged with any
Debts, and any Creditor, whose Debt is so charged, hath at-
tested, or shall attest the Execution of such Will or Codicil,
N every

(1) Whereby " All Devises and Bequests of any Lands or Tenements shall be
in Writing, and signed by the Party so devising the same, or by some other Person
in his Presence, and by his exprefs Directions, and shall be attested and subscribed
in the Presence of the Devisor by three or four credible Witnesses, or else they shall
be utterly void and of none Effect."

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every such Creditor shall be admitted as a Witness to the Execution of such Will or Codicil." Sect. 2.

"If any Person hath attested the Execution of any Will or Codicil already made, or shall attest the Execution of any Will or Codicil to be made on or before the said 24th of June, 1752, to whom any Legacy is thereby given, and such Person, before he gives his Testimony concerning the Execution of any such Will or Codicil, be paid, or have released, or refused such Legacy upon tender thereof; such Person shall be admitted as a Witness to the Execution of such Will or Codicil." Sect. 3.

"In Case of such Tender and Refusal as aforesaid, such Person shall not be intitled to such Legacy, but shall be forever barred therefrom; and in Case of such Acceptance as aforesaid, such Person shall retain to his own Use the Legacy so paid, notwithstanding such Will or Codicil afterwards be adjudged void, for want of due Execution, or for any other Cause." Sect. 4.

"In Case any such Legatee, who hath attested the Execution of any Will or Codicil already made, or shall attest the Execution of any Will or Codicil, to be made on or before the 24th of June, 1752, shall have died in the Life Time of the Testator, or before he have received, or released, or refused such Legacy on Tender, such Legatee shall be deemed a legal Witness to the Execution of such Will or Codicil, within the 29 Car. 2. c. 3. sect. 5." Sect. 5.

"The Credit of every such Witness so attesting the Execution of any Will or Codicil, and all Circumstances relating thereto, shall be subject to the Consideration of the Court and the Jury, before whom such Witness is examined, or his Testimony or Attestation made Use of; or of the Court of Equity

A P P E N D I X.

Equity in which his Testimony or Attestation is made use of.”
Seet. 6.

“ No Person to whom any beneficial Estate, Interest, Gift, or Appointment, shall be given or made, which is hereby enacted to be void, or who shall have refused any such Legacy on Tender, and who shall have been examined as a Witness concerning the Execution of such Will or Codicil, shall, after being so examined, demand or take Possession of, or receive, any Profits from any such Estate, Interest, Gift, or Appointment; or demand or receive any such Legacy or Satisfaction for the same.” *Seet. 7.*

“ This Act shall not extend to the Case of any Heir at Law, or of any Devisees in a prior Will or Codicil of the same Testator, executed and attested according to the 29 *Car. 2. c. 3. seet. 5.* or any Person claiming under them respectively, who has been in quiet Possession for two Years next preceeding the 6th of May, 1751, as to such Lands and Hereditaments, whereof he has been in quiet Possession; and this Act shall not extend to any Will or Codicil, the Validity or due Execution whereof hath been contested in any Suit in Law or Equity commenced by the Heir or the Devisee in any such prior Will or Codicil so contested, or for obtaining any other Judgment or Decree relative thereto, on or before the said 6th of May, 1751, and which has been already determined in Favour of such Heir at Law, or Devisee in such prior Will or Codicil, or any Person claiming under them respectively, or which is still depending, and has been prosecuted with due Diligence.” *Seet. 8.*

“ No Possession of any Heir at Law, or Devisee in such prior Will or Codicil as aforesaid, or of any Person claiming under them respectively, which is consistent with, or may be warranted by any Will or Codicil attested according to the
Meaning

A P P E N D I X.

Meaning of this Act, or where the Estate descended or might have descended, to such Heir at Law, 'till a future or executory Devise by Virtue of any Will or Codicil attested according to this Act should take Effect, shall be deemed a Possession within the Meaning of the Clause herein last before contained." *Sect. 9.*

" This Act shall extend to such of the *British Colonies in America* where the said Act 29 *Car. 2. c. 3.* is by Act of Assembly made or by Usage received as Law, or where by Act of Assembly or Usage the Attestation and Subscription of a Witness or Witnesses are made necessary to Devises of Lands or Hereditaments; and shall have the same Force in the Construction of, or for the avoiding of Doubts upon, the said Acts of Assembly, and Laws of the said Colonies, as the same ought to have in the Construction of, or for the avoiding Doubts upon, the said 29 *Car. 2. c. 3.*" *Sect. 10.*

" As to Cases arising in any of the said Colonies in *America*, no such Devise or Legacy as aforesaid, shall be made void by this Act, unless the Will or Codicil whereby such Devise or Legacy be given, be made after the 1st of *March, 1753.*" *Sect. 11.*

Lapsus Calami in L. C. J. Camden's Argument.

Page.	Line.	for	read
8	29	chargeable	chargeable
9	12	appointed	appointed
35	6	has	but
37	4	Witnesses	Witness's
47	14	inconsiderate	inconsiderable
52	17	after Cases	dele Comma.



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